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Judges Describe Courts in Occupied Germany

Two members of the Court of Appeals in Occupied Germany, the highest court in the American Zone, discuss the judicial system now operating in the United States section of the former Nazi Vaterland. An occupying power replaces the native government of the occupied territory, and not the least of its problems is to determine what system of laws shall be applied and to ensure impartial administration of justice. In Germany, American members of the occupation force, displaced persons and native Germans become involved in legal proceedings, making the burden of determining whether common or civil law concepts were to be used much heavier. Chief Justice William Clark and Associate Justice Thomas H. Goodman explain how these problems have been handled during this occupation of Germany, the longest occupation of a foreign country by Americans in history. (Page 443.)

Patrick Henry as the Embodiment of Liberty

Patrick Henry has been almost forgotten in American history. He is remembered, of course, as a great orator and a leader of the American Revolution, but his less spectacular achievements have been obscured by his opposition to the adoption of the Constitution. In this article, Francis Pendleton Gaines, President of Washington and Lee University, declares that Patrick Henry has been unjustly neglected, that his passionate devotion to freedom has a message for his countrymen of the twentieth century. (Page 448.)

The Dilemma of Foreign Recovery in Our Foreign Policy

The former counsel to the Congressional Joint Committee on Foreign Economic Cooperation—the so-called "Watch Dog" of the European Recovery Program—Louis C. Wyman, points out that the purpose of the plan is to restore European economy, and for that purpose the United States is spending billions of dollars that are widening the present tremendous gap between the Government's income and its expenses. He declares that sooner or later the United States will reach the point where foreign aid must be rolled back; and he offers for consideration the question, what happens if we discover that we have spent extra billions of dollars in Europe to build added competition for American industry and American labor. (Page 451.)

Barnett Hollander Relates Story of English Jury Reform

It has been nearly a thousand years since William the Bastard became William the Conqueror at the Battle of Hastings. Among the things that William brought with him from Normandy, according to Holdsworth, was the jury system, a system that has become the pride of Anglo-American law. But like all things, the English jury has changed with passing centuries, and in 1917, in the midst of war, economies in manpower and public expenditures brought about a suspension of the grand jury. It was revived after the war, but was again abolished, in most cases, in 1933. In 1949, Parliament abolished most of the special juries. Mr. Hollander, a native of Lancashire, who practices both in New York and London, describes the reform of the English jury in this article. (Page 455.)

International Bar Association Is Discussed

The International Bar Association was founded in 1947 after years of work and planning led by the American Bar Association. In this article, Robert Nelson Anderson, the Chairman of the organization committee of the International Bar Association examines the problems that had to be overcome in order to establish an international organization of lawyers and discusses the progress that the three-year-old group has made. (Page 463.)

The Problem of the Foreign Merchant in Trading with Insurgents

The rights of the foreign merchant that wishes to trade with insurgents that have captured *de facto* control of part of their country but have not been recognized as belligerents present a difficult and delicate question of international law. Robert Delson, of the New York Bar, counsel for the Republic of the United States of Indonesia in the United States, and Louis C. Bial, a graduate of Brooklyn Law School, consider this problem, arguing that the fact that the *de jure* government may be physically able to prevent trade in isolated instances does not mean that the insurgents have lost control. (Page 459.)

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The Right To Strike:

Is It an Inalienable Right of Free Men?

by **George Rose** • of the Indiana Bar (Indianapolis)

■ In a democracy, the normal relations of men are peaceable; a strike is a coercive action that often approaches violence. Whether society should condone this breakdown of the usual procedures and accept the possibility of disorder by approving strikes is the question that Mr. Rose considers in this article. The antagonism that frequently is felt between labor and management, he declares, demonstrates the imperative need for better adjustments, for if labor and management cannot solve their conflicts on the basis of reason, then the stronger, economically speaking, will win. This, Mr. Rose says, is in itself an undemocratic use of economic power.

■ The right to strike is one of the most controversial claims that labor organizations have espoused. This is understandable, since through the use of the strike many of labor's greatest gains have been achieved, but on the other hand it is through strikes that heavy losses to the workers have been suffered, as well as injuries to the employer and threats to the community and nation. It is therefore timely for us in view of our recent experiences to consider the essential nature of the strike. Furthermore, in a very recent decision[1] of the National Labor Relations Board relating to a strike by a small minority, the Board ruled that the right to strike as established in the National Labor Relations Act,[2] which was in effect at the time the acts occurred, is not "confined to majority groups within units found appropriate", but is one of the "inherent rights of all free men and employees". Such a conclusion appears to undermine the normal conceptions of collective bargaining as expressed in the Labor Management Relations Act[3] itself, with its language reënacted from the National Labor Relations Act, which entrusts to the representatives of the majority the exclusive right to bargain collectively; for the strike to be utilized for any other purpose than collective bargaining ends or by others than the majority group must be destructive of that right.[4]

It is the prerogative of all free peoples that any person may complain of the conduct of his employer, of public officials or of anyone else. If done by spoken or written mediums without intimidation, it is protected as free speech. The question frequently arises, however, to what extent may this protest be translated into action or given force without wrongful injury to the rights of others.

The strike is the uniting of persons to express their criticism of their employer and to seek his compliance with their views by abandoning their work, leaving their place of employment and engaging for a period of time in a stoppage of work. The right to engage in a strike in its character as a protest by the employees, in so far as it is coupled only with the means of giving public utterance to the dispute with the employer, is surrounded by all the protection that the Constitution can give free speech. As to its phase of economic pressure[5] upon the employer, we must recognize the right of the employees to engage in such activity through leaving the job and thus preventing normal operations and through such stoppage to force

1. *Olin Industries, Inc.*, 86 NLRB No. 36 (1949).
2. 49 Stat. 449, 1935.
3. Pub. L. No. 101, 80th Cong., 1st Sess. (1947).
4. "The Act is designed to prevent strikes, and will not tolerate the use of this weapon to substitute the free choice of a majority in attaining the position of a bargaining representative." *NLRB v. McGough Bakeries Corp.*, 153 F. (2d) 420 (1946).
5. For the purposes of our discussion, economic pressure, force or coercion consists of nonphysical pressure exerted by refusal to buy, to sell, to enter into contracts, to work or to employ that do not involve a violation of the law or an improper deprivation or interference with constitutional rights. There should be a clear understanding of the distinction between economic force or coercion and the threat or act of physical force or violence. Many of our problems arise from the merging of the two, or their merging with the freedoms normally unassailable. While economic force is permissible under certain defined conditions, physical force or the threat of it is a violation of our rights. They have this in common, however, that the use of economic force as well as physical force is destructive of free speech.

him to yield in furtherance of legitimate aims.

There is nothing intrinsically wrong with economic pressure that is not intimidatory or violent. We see economic force in various ways being used constantly in the business world to secure contracts, concessions or other advantages. Consequently, we cannot condemn a strike where benefits are sought from the employer in a lawful manner solely on the grounds that economic coercion is being employed. Beyond this, however, the use of threats and reprisals to prevent the employer from continuing operations in his plant during a strike or other employees from working gives the strike a character incompatible with the constitutional rights of citizens.

Strike Occupies No Privileged Position

Despite the assertion of many union adherents, the strike occupies no privileged position. The Wisconsin Supreme Court, in a case[6] where a union engaged in a series of walkouts in violation of the state law, quoted with approval from a decision[7] of the United States Court of Appeals that stated that "The right to cease work is no more an absolute than is any other right protected by the Constitution" and that "the cessation of work may be an affirmative step in an unlawful plan". This ruling of the Wisconsin court was later affirmed by the United States Supreme Court.[8] Even freedom of speech, of religion, of assembly and press are liable to abuse, and therefore "the right of employers and employees to conduct their economic affairs" must be subject to modification "in the interests of the society in which they exist".[9] In a democracy where the widest latitude should be given to the exercise of these important prerogatives, there are always some who forget the obligations of free men and engage in excesses, bringing discredit upon the system that gives them their liberties.

In determining how this protest may be made effective, as through a strike, we must look at the Labor Management Relations Act,[10] which expressly forbids interference with or impeding or in any way diminishing the right to strike. What actions are forbidden by this general provision? The inference from the fact that the Wagner Act was closely tied to the Norris-LaGuardia Act[11] in language is that the use of the injunction to prevent a walk-out is prohibited. However, it is obvious that this is not all that was contemplated, since Section 2 (3)[12] of both the new labor law and the old provide for the continuance of the employee relationship where "work has ceased as a consequence of, or in connection with any current labor dispute". In addition, Section 8(a)1[13] bars interference with, restraint or coercion in the exercise of collective rights, of which the right to strike is one, and Section 8 (a) 3 bars discrimination to discourage membership in the union. These sections have been construed by the Board and the courts as prohibiting discrimination against employees for engaging in a strike. Although great emphasis is given to the right to leave the job and participate in a strike, the employee's vital concern is displayed in recapturing his job at the end of the strike, because without giving protection to the claim to be reinstated in his job when the strike is over, this right to strike would be a nominal privilege.

Let us consider the question, may the law in this manner protect the place of the employee that goes out on strike? He may quit his job and take another, but this would not be a strike. Has he the right to discontinue his duties, leaving the employer with unfinished products, some of which may deteriorate and be a loss, by going out on strike, and then when the strike is at an end, come back to the employer and be able to assert a right to his old job? Is there such an urgency about a strike that the law may sanction this disregard by the employees of their obligation to the employer and their indifference to the damage for which they are responsible? If the employer's right to conduct his business is excessively interfered with, then the right to strike will be destructive of the very thing the employee is seeking to enhance, his job. Under a no-strike clause in a contract, the courts have upheld the loss of jobs by strikers ceasing to work in "repudiation of their agreement".[14]

The emergency in the minds of the strikers arises from the desire to gain a tactical advantage over the employer when he is unprepared because of their fear that the union is less able to finance the strike than the employer to resist. With the unions accumulating vast treasuries nowadays in amounts beyond those available to the average employer, the unions do not suffer from such a disadvantage.

Do Employees Have Duty Not To Harm Employer?

Unless there is a breach of contract, malice, fraud or violence, the employer should scarcely expect to be able to go to the court to gain help if he has unwisely hired lazy and irresponsible employees that go out on strike with little or no provocation. These are the uncertainties of any business undertaking. Moreover, the courts have refused to enforce personal service provisions of contracts,[15] which would require the employees to run machines or otherwise resume their duties. However, isn't there implicit in the simple contract of employment a promise by the employees to perform their duties, and not wantonly to cause the employer harm? Must the employer be under obligation to reinstate them when they are ready to return to work?

6. *International Union, United Automobile Workers v. Wisconsin Employment Relations Board*, 20 LRRM 2357 (1947).
7. *Western Union Telegraph Co. v. I.B.E.W.*, 2 F. (2d) 993 (1924).
8. *International Union, U.A.W., A. F. of L. v. Wisconsin Employment Relations Board*, 336 U. S. 245 (1949).
9. *Carpenters and Joiners Union v. Ritter's Cafe*, 315 U. S. 722 (1942).
10. See note 3 *supra*.
11. Pub. L. No. 65, 72d Cong., 1st Sess. (1932).
12. See notes 2 and 3 *supra*.
13. See note 3 *supra*.
14. *NLRB v. Sands Mfg. Co.*, 306 U. S. 332 (1939).
15. *Arthur v. Oakes*, 63 Fed. 310 (1894).

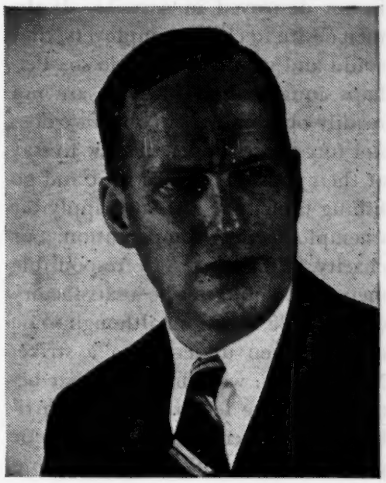
The National Labor Relations Board has distinguished between a strike caused by unfair labor practices on the part of the employer and the so-called economic strike utilized to force concessions from the employer. In the first, the employer must restore the employees to their jobs when they apply for reinstatement, while in the second, if the jobs are filled, there is no obligation to rehire.[16] In making this determination, the Board has made a persuasive but an illogical distinction[17] if the right to strike is to be protected in this manner and if the right does partake of freedom of speech as argued by the unions. To the writer, however, it appears that if the strike is not called in wanton disregard of the requirements of the business, necessary to its continued existence, or of the employee's obligations, or of the welfare of the community, the striker is entitled to the same relief, regardless of which one of the two classes of strikes it may be. In view of the recourse to the Board afforded to employees, particularly in regard to unfair labor practices, such strikes are sometimes as unjustified as any others. If this obligation to reinstate is to have real validity in the law, wherein the parties stand as equals and not one as a favored client, there should be a corresponding obligation upon the employees to exercise their right to strike without unnecessary injury to the employer.

Some have sought to identify the right to strike with the right of a man to change his job. This resemblance is only superficial, in that they both relate to men leaving their work, but the two are utterly different fundamentally. The right of a man to take another job is a basic liberty. It is a political right of a man to determine his own future, to live where he wishes, to work where he finds employment without any other person deciding it for him. He may be limited in his choices because of education, mentality, training and job opportunities, but it is not the state or the union that should determine his choice.

New Labor Act Is Not "Slave Labor" Law

In line with their efforts to maintain the right to strike unencumbered, the unions have consistently objected that any limitation was involuntary servitude, which is forbidden under the Thirteenth Amendment. For this alleged reason the unions called the Labor Management Relations Act[18] a "slave labor" law, since it restricted the right to strike under certain conditions. In this contention the unions have erred, because in the qualifying of the right to strike, there is no denial of the individual's right to seek another job. The Supreme Court in a peonage case said that "The aim of the Thirteenth Amendment, as implemented by the Anti-Peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States".[19] And continuing the Court said "In general the defense against oppressive hours, pay, working conditions or treatment is the right to change employers". In other words, the right of a man to quit his job and take another is made the test of involuntary servitude as forbidden in the Constitution. Respecting this situation specifically, the Labor Management Relations Act[20] provides that "Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act . . . ."

In a case arising under the War Disputes Act[21] limiting the right to strike, the Court of Appeals said, in answer to the union's objection that such provision imposed involuntary servitude, "There is a wide distinction between a worker quitting his job, for any reason or no reason, on the one hand, and a cessation of production by workers who seek to win a point from management on the other hand".[22] Continuing, the court pointed out that this restriction on the right to strike "refers to circumstances involving a continuing master and servant relationship", and "there is no involvement" with the "right of the worker to quit his job or the right of the employer to discharge him for cause".



George Rose has been a regional and trial attorney for the National Labor Relations Board. A graduate of the University of Pennsylvania Law School, he is now engaged in private practice in Indianapolis, Indiana, specializing in labor law.

Strike Is Opposite of Expressing Desire To Change Jobs

When a group of men strike, they are not expressing a desire to change their employment as protected by the Constitution. On the contrary, a strike is actually a determination not to abandon their jobs, but to seek some additional advantage in connection with retaining them. This was recognized in Section 2 (3) of both the Wagner Act[23] and the Labor Management Relations Act[24], as noted above, which provided that this employer-employee relationship

16. *NLRB v. Mackay Radio and Telegraph Co.*, 304 U. S. 333 (1938).
17. *Columbia Pictures Corp.*, 64 NLRB 490 (1945).
18. See note 3 *supra*.
19. *Pollock v. Williams*, 322 U. S. 4 (1943).
20. See note 3 *supra*: § 502.
21. Act of June 25, 1943, c. 144, 57 Stat. 168, § 8.
22. *France Packing Co. v. Dailey*, 21 LRRM 2344 (1948).
23. See note 2 *supra*.
24. See note 3 *supra*.

is not destroyed in a strike. If the men desire to change employers, they could and would quickly do so. Perhaps equally desirable jobs are not readily obtainable, but this fact does not force them under the law to stay at their jobs. They can quit and go fishing under the law, and apply for unemployment compensation or charity. Of course, to responsible men, that would not be a satisfactory or desirable situation, although some do this when undertaking a strike. Nevertheless, we cannot say that because jobs are few, through no artificial scarcity created for control or punishment of workers by the union, employer or the Government, the men are in bondage in their employment.

When a man takes a job, he has the right to abandon that job and take another at any time he wants, subject to whatever restrictions he may have voluntarily agreed upon in a proper contract with regard to the use of his particular abilities in relation to his employer. However, his right to quit the job and to seek another elsewhere does not mean that he has the right to leave his work whenever he chooses, set his own hours of employment, and still retain the job.[25]

Some years ago, Mr. Justice Brandeis pointed out that "Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike".[26] The Supreme Court quoted this with approval in a recent case above cited. The Court went on to say that "The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for lawful purposes of collective bargaining which this Court has characterized as a 'fundamental right' . . . . As to the right to strike, however, this Court, quoting the language of Section 13,[27] has said, . . . 'But this recognition of "the right to strike" plainly contemplates a lawful strike, . . . the exercise of the unquestioned right to quit work' and it did not operate to legalize the sit-down strike, which state law made illegal and state authorities punished".[28]

Right To Refuse To Work Protects Worker's Liberty

In a recent New Jersey case, the union attacked the state law requiring compulsory arbitration in labor disputes in public utilities, contending that such law imposed involuntary servitude. The Court in discussing the union's position said "The argument about involuntary servitude . . . runs somewhat as follows: Economic pressure, the necessity for earning a livelihood, compels the members of the Union to work for the Telephone Company; this compulsion does not amount to involuntary servitude as long as they freely bargain with the employer on wages and conditions of work; but when the bargaining process is superseded by compulsory arbitration, their employment becomes servitude".[29] This reasoning, the Court pointed out, was fallacious, for "What preserves the employee's liberty under the Constitution is not collective bargaining but is the right of the individual to refuse to work for the Telephone Company. The rights secured by the Constitution are secured to individuals and not to classes". Discussing this further the Court noted that in any large group of employees "there must be many who do not want the Union to be their bargaining agent and many others who", while satisfied with the union, "are dissatisfied with the stipulated wage scale". The Court said "If the argument of the Union were sound, then this minority would be condemned to involuntary servitude when wages were fixed by the collective bargaining process. But I can say again, their constitutional right is preserved because they can surrender their employment".

The union also contended that "there is an inherent right to strike, a right beyond the reach of the State". In reply, the Court said "I know of no such right when the strike will cause great injury to the public. In my opinion, the adoption of the Union's view in this respect might lead to national disaster. It is hardly too much to say that the uncontrolled and unlimited right to strike is the right to destroy the State, a right which I am certain very few, if any, members of the Union desire".

Law Preserves Right To Terminate Employment

This opposition to any qualification of the right to strike, is echoed in the union's contentions in a very late case relative to the Michigan law that required certain steps to be taken to assure that a prospective strike was approved by a majority of employees. The union argued that such restriction upon the right to call a strike was to deny freedom of speech and due process of law. The Court ruled that "a strike is not only a means of exercising the right of free speech, but it is likewise a medium of exercising coercion. As such it is subject to reasonable regulations by the state in the exercise of its police power".[30] In response to the union's attack upon its constitutionality, the Court said that "the right of an individual to terminate his employment is expressly preserved to the employee" in the law.

In the case of the national mine strike of 1948 where an injunction was issued against the United Mine Workers and its president, the union likewise took the position that the injunction deprived the miners of liberty of speech under the First Amendment and constituted involuntary servitude under the Thirteenth Amendment. The judge ruled that "it had never been held by any court that an injunction to prevent a strike was a deprivation of the liberty of speech" or "that an injunc-

(Continued on page 518)

25. *Home Beneficial Life Insurance Co. v. NLRB*, 19 LRRM 2208 (1947); *G. C. Conn, Ltd. v. NLRB*, 108 F. (2d) 390 (1939); *International Union, U. A. W. v. Wisconsin Employment Relations Board*, see note 8 *supra*.

26. *Dorchy v. Kansas*, 272 U. S. 306 (1926).

27. See note 2 *supra*.

28. *NLRB v. Fansteel Metallurgical Corp.*, 306 U. S. 240 (1939).

29. *International Union, U.A.W. v. Wisconsin Employment Relations Board*, see note 8 *supra*; see also, *State v. Traffic Telephone Workers Federation*, 22 LRRM 2469 (1948).

30. *U.A.W. v. McNally*, 24 LRRM 2262 (1949).

American Justice in Occupied Germany:

United States Military Government Courts

by William Clark and Thomas H. Goodman

▪ On August 16, 1948, the courts martial that had administered justice in the United States Zone of Germany since the fall of the Third Reich were replaced by a civilian court system with eleven judicial districts and a Court of Appeals. This article, written by two members of that Court of Appeals, Chief Justice William Clark, former Judge of the United States Court of Appeals for the Third Circuit, and Associate Justice Thomas H. Goodman, former Judge of the Court of Appeals of the State of Tennessee, describes the system of military government courts in Occupied Germany.

▪ Although we like to think of ourselves as a pacific people, the harsh facts of international life have resulted in our undertaking numerous military occupations. The United States in its history has engaged in ten military occupations: Florida; the Confederate States; Mexico twice (1848, Lower California; and 1916, Tampico); Cuba; Puerto Rico; the Philippines; the Rhineland; and now Japan and the United States Zone of Germany.[1] All of them except Tampico, the Rhineland and the occupations arising out of this war have been the occasion of litigation and have been discussed by the United States Supreme Court. They have lasted for differing lengths of time (the present one has already been longer than any of the others). In each of these occupations the Military Governor has set up a system of courts according to a more or less elaborate pattern. The courts in Mexico were described by a Supreme Court Justice as follows:[2]

> Accordingly we find that there was ordained by the provisional government a judicial system, which created a superior or appellate court, constituted of three judges; and circuit courts, in which the laws were to be administered by the judges of the superior or appellate court, in the circuits to which they should be respectively assigned.

The military tribunals established in Florida[3] and the South during the War between the States[4] have been referred to frequently in the decisions of that august tribunal. The same is true of Cuba,[5] Puerto Rico[6] and the Philippines.[7] No litigation, in the United States at any rate, seems to have resulted either from the occupation of Tampico or the Rhineland. Our military tribunals there have been described and discussed by Birkheimer[8] and in the Hunt Report[9].

Occupying Power Must Set Up Courts

As the occupying power of necessity is substituted in some degree for the conquered sovereignty, it must establish some form of government. In all governments a system of courts is essential. So in each of the occupations in which the United States has participated, the Military Commander has established some kind of a judicial system.

Although the power behind an occupation is of course that of the Army, it is not necessary for all the personnel of the government-comprising functionaries to be members of the Armed Forces. Apart from occasional exceptions during the War between the States, the governing personnel of all our occupations, until the German one, have been drawn from those forces. In the German occupation, the British at once and the French and Americans gradually abandoned government by soldiers and either brought in civilians or made civilians of those already here.

Unfortunately, as we think, the

1. *Sed quaere* Haiti and Nicaragua.

2. *Leitensdorfer* v. *Webb*, 15 L. Ed. 891 (1858); see also *Fleming* v. *Page*, 12 L. Ed. 278 (1850); *Jecker* v. *Montgomery*, 14 L. Ed. 248 (1850).

3. *American Insurance Co.* v. *356 Bales of Cotton*, 7 L. Ed. 242 (1828).

4. *The Grapeshot*, 19 L. Ed. 651 (1869); *Handler* v. *Wickcliff*, 20 L. Ed. 365 (1869); *Planters Bank of Tennessee* v. *Union Bank of Tennessee*, 21 L. Ed. 473 (1870); *City of New Orleans* v. *New York Mail*, 22 L. Ed. 354 (1874); *Raymond* v. *Thomas*, 23 L. Ed. 434 (1875).

5. "The Insular Cases", 1 Col. L. Rev. 436 (1901); *Neely* v. *Henkel*, 21 S. Ct. 302 (1905).

6. *Dewley* v. *U. S.*, 21 S. Ct. 762 (1901); *Ocloa* v. *Hernandez y Morales*, 33 S. Ct. 1033 (1913).

7. *McCloud* v. *U. S.*, 33 S. Ct. 955 (1913).

8. Birkheimer, *Military Government and Martial Law* 306.

9. *Hunt Report* 94; 17 *Am. Jour. Intl. Law* 460.

military government courts system was the last institution to be reorganized in that manner. In the first three years it remained a hybrid, partly military and partly civilian both in personnel and in operation. It finally became apparent that quasi courts martial were an anachronism in a civilian government. One of the authors of this article (Justice Clark), then a consultant in the Legal Division of the Office of Military Government for Germany (United States), was entrusted with the task of organizing and establishing a court system that should be purely civilian in character.

On August 16, 1948, there were promulgated the three Military Government Ordinances that created the present court system; namely, Ordinance No. 31, which established the courts; Ordinance No. 32, which provided a Code of Criminal Procedure; and Ordinance No. 33, which provided a Code of Civil Procedure. As stated in the letter of transmittal from the Office of Military Government to the Länder, these ordinances established the system of the courts and judicial districts, established a court of appeals and the office of chief attorney, provided for process and for the appointment of judges and prosecutors and their respective qualifications. With respect to procedure, the letter states:

> The Code of Criminal Procedure adapts present practices to the new system and introduces a number of safeguards of the rights of the accused and of the witnesses which Anglo-American practice recognizes as essential. The Code of Civil Procedure adapts the present procedure before the Military Government Court of Civil Actions to the new system and clarifies and expands many provisions.

The United States area of control in Germany consists of Land Bavaria, Land Hesse, Land Württemberg-Baden, Land Bremen, and the United States Sector of Berlin. By virtue of the provisions of Ordinance No. 31, eleven judicial districts were established within this area, for each of which there were provided district judges, magistrates, and district attorneys. Jurisdiction was prescribed for such judges and magistrates, and for courts comprised of three district judges or two district judges and one magistrate. The ordinance also provided for a chief attorney, assistant chief attorneys, a court of appeals, consisting of a chief judge and six associate judges, and for administrative personnel usually attendant on such tribunals.

Occupying Power Must Safeguard Impartiality of Courts

The principle underlying and that justifies both the establishment and the jurisdiction of the courts of an occupying power is the safeguarding of impartiality. That principle requires not only the actual fact of impartiality, but also the protection of the courts against any feeling on the part of the litigants that even-handed justice is difficult for them. A judge may decide impartially his brother's case. He should not do so because, human nature being what it is, no one will believe in his freedom from favoritism.

Our own federal courts were created because, in the early days of the Republic, a local prejudice existed against "strangers" from other states. We have applied this reasoning in our prescription of jurisdiction in the military government courts. Clearly the German courts might be charged with lack of impartiality in cases where either the occupation personnel, displaced persons, persecutees or citizens of the allied nations are involved. So our courts try all such cases and all Germans that have become concerned in them. For instance, if the dependent wife of a soldier shoots her husband (we had two such cases), she is tried in a military government court. If a displaced person is found in possession of forbidden currency, he is similarly so tried. On the other hand, if a German breaks into an American billet and robs it, he too is tried in a military government court. On the civil side, the same thing is true. If an American soldier commits a tort against a German or vice versa, the military government court has jurisdiction.

There is one limitation on this jurisdiction, arising out of the character of an army. Armies have for many years been and must be governed by special codes appropriate to their circumstances. In the case of the United States, that code is entitled "The Articles of War", enacted by the Congress. They are applicable to members of the Army and certain other classes of persons closely connected therewith. It has been contended that these articles confer an exclusive jurisdiction upon the army courts, namely courts martial. Our Court of Appeals, in the first case in which the argument was put forward[10], decided that the jurisdiction was only exclusive if the Military Commander insisted; he could, however, waive the Army's claim to try a case in favor of the military government courts. The Military Commander in Germany has directed our courts to try all civilians, no matter what their relationship to the Army, and reserves for courts martial only those in the actual service.

Right To Make Laws Is in Occupying Power

As the occupying powers have the right to govern, they have the right to make laws. They could, therefore, have prescribed any existing system of laws or have drafted their own. What they have done, we think, commends itself. They have adopted the German substantive law, with the exception of certain Nazi provisions, both criminal and civil, and have retained the United States procedural law. In so doing, the Military Government has followed the long-established principle of private international law that the law of the place governs. As a matter of policy it is wise to apply to the Germans their own law, and there seems to be no reason for making an exception in favor of non-Germans from the principle of the conflict of laws just referred to. The German Criminal and Civil Codes compare favorably with similar codes in the United

10. *U.S.M.G. v. Wilma Baker Ybarbo*, Op. No. 29, dated March 14, 1949.

States. It is interesting for judges trained in the common law to administer the codes of a civil law country. We have the assistance of German lawyers employed by Military Government and assigned to the courts.

We could have abandoned the law of the forum in procedural matters also. In the civil law countries, the admission of certain evidence is almost entirely a matter of judicial discretion. There being no jury, to safeguard its protection against untrustworthiness is unnecessary. In the earlier military government courts, the rules of evidence as we know them were not applied, but the yardstick for the judge was the "rational probative value" of the particular evidence offered. When the new courts were established, it was thought desirable to apply our common-law rules. We felt that those formal rules gave more protection to an accused than that afforded by a general discretion, and further, that some knowledge of them by the German Bar might have a beneficial effect on their courts.

Neither courts martial nor the German courts (except to a limited extent) make use of juries. Both in the new and the old court systems, we have followed their example. The British, on the other hand, have juries for the trial of their nationals. The arguments pro and contra are those which have been advanced with regard to the respective merits of expert triers of the fact and the inexpert peers of the accused. The British compromise is based on the premise of trying each man according to the system of his own country.

United States Constitution Does Not Follow Flag

It was considered that in denying our civilians a trial by jury, we are not violating any amendment to the Constitution. Ever since the original consular courts were established in China, our Supreme Court has said that Napoleon's maxim that *"où est le drapeau, c'est la France"*[11] does not apply to our Constitution and that accordingly the guarantee of jury

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trial is limited to the territorial United States.[12] Later cases coming from Cuba, the Philippines and Hawaii are to the same effect. The doctrine arose out of necessity. The jury of the neighbors is not usually available in foreign lands.

We have spoken of the jurisdiction of the military government courts and said that it was based on the principle of presuming impartiality. Our civil jurisdiction is principally limited to one class of cases —motor vehicle accidents. Recommendations have been made that civil jurisdiction be granted as to everything except real property and domestic relations, subjects of a distinctly local character.

Before the war, an international treaty had provided for the trial in the local courts of certain minor violations arising from the navigation of the River Rhine. Such of the violations as occur when the Rhine flows through the United States area of control are assigned to our district courts with appeal to an international commission sitting in Paris.

The Court of Appeals, pursuant to authority granted it by the ordinance, has promulgated Rules of Practice that include matters pertaining to the organization and administration of the court, provision for admission to practice and for disbarment, and court forms. The Canons of Professional Ethics and the Canons of Judicial Ethics of the American Bar Association are adopted as rules of the Court.

At the outset of the operation of the Court of Appeals, the practice was inaugurated of holding court at central points within the respective Länder. There were two motivating factors behind this determination: first, to facilitate the attendance of defense counsel; and second, to acquaint the local Bars with the new system and its procedures. The results thereof have been most salutary. The Court of Appeals has held hearings at Bremen, Frankfurt, Wiesbaden, Heidelberg, Stuttgart and Munich; in most instances in panels

11. Loriot, *Occupation de Guerre* (1903) 282.
12. *Ross v. McIntyre*, 11 S. Ct. 897 (1891); *Dorr v. U. S.*, 24 S. Ct. 808 (1904); *Balsac v. Porto Rico*, 282 U. S. 298 (1922); *Hawaii v. Mankichi*, 190 U. S. 197 (1903); *Ex parte Quirin*, 63 S. Ct. 2 (1942).

of three, but, in all cases involving the death penalty, with a quorum of the full court present. In most of the centers of population, legal seminars attended by the Court and conducted by the Chief Judge have been held with considerable attendance by the members of the German Bar. These have proved most helpful both to the court in relation to matters concerning German law and to the local lawyers in matters concerning military government ordinances and regulations and Anglo-American procedure.

Only One Civil Appeal Has Been Heard

In view of the rather limited civil jurisdiction yet ordained, only eight civil appeals have been heard. In the first, most of the fundamental issues were presented. It involved a collision between an automobile belonging to a United States Army officer and a bicycle ridden by a German civilian. The question of negligence on the part of the defendant's driver, the contributory negligence of the plaintiff, and the amount of damages were there presented. The court therein affirmed the findings of the district court, applying the American law of torts pursuant to then-existing military government ordinance prescription. The amount of the judgment was reduced.[13]

On the criminal side, the court has decided some 300 cases. Among the questions of law determined, the court has held that the right granted it by the ordinance to reduce a sentence required no precise formula; that as distinguished from executive clemency or executive grace, the court might exercise judicial discretion in determining whether or not a sentence was excessive;[14] that a dependent wife who killed her soldier husband was not subject to trial under a military government ordinance designed to provide security for members of the Allied Forces, no threat to such security being involved, but that she was subject to trial by a military government court on a charge laid under the German law; and that trial by a military government court having been authorized by the Commanding General, European Command, the defendant was not entitled to a trial by court martial;[15] that complete intoxication constituted a defense to a charge of a crime, an essential element of which was intent;[16] that on a charge of unlawful possession of counterfeit money, the defendant having reason to believe the same was counterfeit, *scienter* might be established by circumstantial evidence; that, under the United States military government ordinances, a defendant could waive the limitation on time between the service of charges and arraignment and between the service of charges and trial; that a defendant had no right to inspection or disclosure before trial of evidence in the possession of the prosecution; that the credibility of a witness could be impeached through proof of inconsistent or contradictory statements; that new or additional evidence could not be presented before the appellate court; that official records to be admissible must bear authentication by the official in whose custody the original record is entrusted; that in the absence of statutory provision a record of trial might be corrected upon appeal, provided application therefore substantially conformed to the Rules of Criminal Procedure for the District Courts of the United States;[17] that it is incumbent upon the prosecution, prior to the introduction of a confession in evidence, to show affirmatively that the confession was voluntary; that under the German (and British) rule a defendant is not guilty of bigamy upon marriage to a second wife, although the bonds of matrimony with the first actually still subsist, if he was of the honest belief that the first spouse was dead;[18] that on trial of a charge of illegal disposition of United States gasoline, the defense that gasoline coupons that came into defendant's possession represented title to gasoline and that, therefore, such gasoline was no longer the property of the United States was without merit as such coupons merely constituted a medium of exchange and that title to the gasoline did not pass until the coupons were surrended and the gasoline delivered;[19] and that the offense of unlawful importation of contraband was not established in the absence of proof that defendant had knowledge of the importation and that he was participating therein, as distinguished from knowledge of the character of the articles.[20]

It would extend this article unduly to include a "Who's Who" of the court personnel. We might mention that initially appointed to the Court of Appeals were William Clark of New Jersey, Chief Judge, formerly District Judge and Judge of the United States Court of Appeals for the Third Circuit; Juan A. Sedillo of New Mexico, Associate Judge, formerly a New Mexico state senator and, prior to the establishment of the present courts, Chief Legal Officer of Bavaria; Carl W. Fulghum, of Colorado, Associate Judge, formerly county attorney, United States Commissioner for the District of Colorado and Chief of the Military Government Court Branch in Württemberg-Baden; Marc J. Robinson of Massachusetts, Associate Judge, formerly law partner of Mayor Mansfield at Boston and Deputy Chief Legal Officer for Land Hesse; Thomas H. Goodman, of Tennessee, Associate Judge, formerly circuit judge for the Third Judicial District of Tennessee and Judge of the Court of Appeals of the State of Tennessee; and Justin W. Harding of Ohio, Associate Judge, formerly United States District Judge, Alaska. Worth B. McCauley, from Oklahoma, formerly a lawyer in Oklahoma City, was appointed Chief Attorney for the Military Government. Incidentally, all the foregoing

13. *Schweida* v. *Nichols*, Op. No. 93, dated July 5, 1949.
14. *U.S.M.G.* v. *Savanevicius*, Op. No. 3, dated January 25, 1949.
15. *U.S.M.G.* v. *Wilma Baker Ybarbo*, Op. No. 19, dated March 14, 1949.
16. *U.S.M.G.* v. *Iwan Kulenko*, Op. No. 20, dated March 21, 1949.
17. *U.S.M.G.* v. *Alexandro Pavlovic*, Op. No. 10, dated February 24, 1949.
18. *U.S.M.G.* v. *Dragoljuv Milojkowicz*, Op. No. 15, dated March 3, 1949.
19. *U.S.M.G.* v. *Maslov*, Op. No. 46, dated March 31, 1949.
20. *U.S.M.G.* v. *Karo*, Op. No. 59, dated April 12, 1949.

were World War II veterans with overseas service in the Army of the United States. A preponderant majority of the district judges and magistrates are lawyers that have been in the Military Government or the Judge Advocate General's Corps and have returned to civilian status. Efforts are being made to establish a system of recruitment from the United States that will assure employment of the best qualified[21] personnel available. In this the facilities of the American Bar Association and the bar associations of the various states can be of invaluable assistance.

The court system for the United States area of control in Germany represents a considerable development in the field of military government in occupied territories. It must be conceded, we believe, that it is performing a major function in the education of the German people in the democratic processes, a primary object, it has been repeatedly said, of the occupation itself. Anglo-Saxon courts have always exemplified democracy at its best. It is our sincere hope that our courts will in true tradition contribute to the destruction of the totalitarian concepts that prevailed in the Third Reich.

21. Article 14, Military Government Ordinance No. 31, provides:

"*Qualifications:* 1. The Chief Judge and Associate Judges of Court of Appeals, District Judges, Magistrates, the Chief Attorney and his Assistants, and the District Attorneys and their Assistants must be graduates in law and members in good standing of the Bar of one of the States of the United States or of the District of Columbia, and must have been engaged in active legal work (as an attorney at law, as Judge of a Court of Record, or as a teacher of law at a law school approved by the American Bar Association) for at least: a. Ten years in the cases of the Chief Judge and Associate Judges of the Court of Appeals, and the Chief Attorney; b. Five years in the cases of the District Judges, and Assistants to the Chief Attorney; c. Three years in the cases of Magistrates and District Attorneys; d. Two years in the cases of Assistant District Attorneys.

"2. The above qualifications may be waived by the Military Governor in any particular case upon written recommendation of his Legal Advisor."

The Philosophy of a Lawyer

▪ We have received a small collection of some of the letters of a distinguished member of the Bar of Arizona, Henry F. Ashurst, who served as United States Senator from Arizona for five terms—a period of nearly thirty years. The letters were written in the early forties and are well worth reading. Senator Ashurst has given us permission to quote from some of them. They cover a variety of subjects and set forth a philosophy that serves well in these uncertain, fearful days of war and cold war.

In one letter, Senator Ashurst recalls the days of his youth when he was working as a cowboy. He remembers a fellow cow-poke, Bill Babbitt, "a clean-spoken, chivalrous cowhand":

> The thundering herd would sometimes stampede, and this caused some cowhands to let out profanity as they rode furiously and hard, but Bill was serene and silent as he rode, and let out no profanity, even of the low, sweet, soft kind.
>
> When the chuck wagon would break down or get lost, or the camp cook would turn cranky and there was nothing for supper but "wind pudding," Bill was patient and pleasant and endured all hardships with an almost royal humor.
>
> Some years ago Bill went to that vast realm where kings and queens are probably counted as deuces and the American cowboys are probably counted as aces.

The Senator may have learned some of his sturdy philosophy from Bill Babbitt, for in 1943 he wrote the following to a Montana lawyer congratulating him on his eightieth birthday:

> I send congratulations not only upon your attaining fourscore years but also upon the brave manner in which you have met these years. *How* one meets the years—not how many years one meets—is the test.

Of the war, he declared "It is obvious that the War has caused you to take a dark view of the world, but I believe that the resilient, elastic, buoyant properties of the human race will spare it from extinction. . . ."

Senator Ashurst was defeated for reëlection to the Senate in 1940, after almost thirty years of service. How he viewed that defeat is shown in a letter, written four years later to "a Senator who suffered sharp disappointment over defeat":

> . . . Your vast experience should carry you beyond complaint. He who is on top today will be at the bottom tomorrow; such is the law of politics. You speak of "great"; no man is great unless he has had suffering, sorrow and humiliation. You say that you expected some "appreciation" from your constituents, but you have overlooked the necessity for ingratitude in a Republic.
>
> . . . Gratitude is a luxury or jewel in which Kings and Princes may indulge, but a Republic will not for long remain a Republic if it toys with such an occult gem. . . . Had the Saints: Peter, Paul, and Stephen died from mere old age in very comfortable financial circumstances, their contribution might not have been so splendid. Demosthenes, greatest Athenian orator and Aeschylus, greatest Greek tragic poet, knew that the banishment under which they fell would crown their respective achievements with immortality. The renown of Socrates would have been eaten away by the tooth of time had it not been embalmed in hemlock. While it is well that a great oration should end with a crescendo, that is; with increasing volume and tone, a distinguished human career, in order to achieve the glory and sympathy and the mystery of martyrdom should end with a decrescendo.

And, on the day before his own retirement from the Senate, he wrote to a friend and adviser,

> Tomorrow I shall no longer be Senator and shall lay down the burdens and honors of this office which, through the kindness of the people of Arizona, I have carried for nearly thirty years.
>
> It is a habit of successful men to remain mute as to persons who aided the successful to climb to fame. Rarely do those who achieve their ambition, praise or thank those who helped them up the steep acclivity. This studied refusal of the successful to acknowledge benefits, arises partly from the fear that words of praise and thanks toward others might tend to shatter the myth of "self-made man" which myth public characters often wrap around themselves, and it also arises partly from an inflated self-esteem. . . .
>
> Good words are the sons of earth, but good deeds are the daughters of Heaven, and your many years with me are filled with good deeds toward me and mine; for all this I am truly grateful.

Patrick Henry:

The Embodiment of a Great Idea

by Francis Pendleton Gaines • President of Washington and Lee University

■ The name of Patrick Henry is a great one in American history. Every schoolboy knows him as the man who said "Give me liberty or give me death!" Few schoolboys—and few Americans—probably know anything else about him. In a recent address before the Virginia State Bar Association, Dr. Gaines called attention to the fact that Henry was more than a fiery orator that fanned the flames of the American Revolution. In this article, taken from that speech, Dr. Gaines points to Henry as the embodiment of the idea of liberty, a subject about which he felt so strongly that he opposed adoption of the Constitution because he feared it would infringe upon freedom of the individual. This may have pointed out a fundamental defect in the original Constitution, Dr. Gaines notes, and have led to the adoption of the first ten amendments.

■ Most of us have heard just enough about Patrick Henry to let it rest at that. I dare say there is not a Virginian of my generation that has not declaimed with varying degrees of success what we consider Patrick Henry's greatest speech. If you have been school teachers you will have judged a hundred declamation days on which you heard that masterpiece murdered and you will be willing to memorialize it and let it stay dead.

I have sometimes read that he who gave such a marked impetus to our desire for liberty challenged too boldly the coherence of that society as it might be achieved by a constitution drawn by other Americans. Perhaps it is true that Virginians Richard Henry Lee, Patrick Henry and George Mason, who proved to be on the losing side in the constitutional debate, have suffered damage to their reputations. I have heard the statement made, which I do not defend, that the paradox of Henry's career overshadows somewhat the power of his person, that he who was more liberal at first than Jefferson or Madison became more conservative than Washington or Marshall.

I disagree emphatically with those statements. It may be true, as one man said whose name eludes me for the moment, that while not even Patrick Henry's worst enemy would attack his intellectual honesty, not even his best friend would completely defend his political consistency.

But Patrick Henry has become something more than a theme for historical argument. He has become the embodiment of a great idea. He has become the prophet and, I think, the most effective as well as the most volcanic prophet of an opportunity committed to our hands.

I have no purpose of entering upon a discussion of his administrative career except to say that the facets of his abiding contribution have not been emphasized in general American history. We honor George Rogers Clark, and I think justly so—that immortal who determined that the great heartland of America should lie under the American flag—but we forget that the governor who authorized him and sustained him through it all was Patrick Henry.

We think too often, I am afraid, of Patrick Henry as wielding terrible opposition to the adoption of the Constitution. There was a time, I believe, when the whole question of whether or not the American Constitution was to become established rested on whether or not Patrick Henry could be thwarted. I volunteer the assertion that nothing in the whole course of these events so truly frightened George Washington and James Madison and other proponents of the Constitution as did the fact that Patrick Henry was against it. You may remember their very shrewd trick of choosing one of the most beloved and eloquent of the younger men of the day and assigning to him the task that I think was without doubt difficult, that of heckling Patrick Henry; because when Patrick Henry's effects had been achieved it was absolutely essential that the spell should be broken, and the smartest and cleverest and one of

the shrewdest of them all was designated for the job. We haven't done him honor, either. He was the one who some years later was to declare George Washington to be first in war, first in peace, and first in the hearts of his countrymen: Henry Lee.

But we forget, and I again surmise though I feel reasonably sure in my assumption, that it was the opposition of Patrick Henry more than any one single factor that revealed to Madison and Washington the fact that the Constitution then was deficient in the guarantees by which a people's safety could be assured, and that the Bill of Rights must be immediately appended; and we forget that although Patrick Henry literally frightened George Washington—if George Washington could be frightened—when Patrick Henry was opposing the Constitution, after the Constitution had been adopted and the Government had been established, George Washington, who was not in the habit of giving the highest offices of government to pay for political performances in campaigns, offered both the Secretaryship of State and the Chief Justiceship of the United States to Patrick Henry. And these proffers were on the ground of ability and achievement, entirely apart from the admitted eloquence, entirely apart from the oratory that has become somewhat of a legend and, God forgive us, something of a phrase and nothing more.

I have no purpose here to prove Patrick Henry's power as an orator. That is not my intention. It is legendary; yet it is remarkable that we have almost more authentic manuscripts from Demosthenes and Moses than from Patrick Henry and, by the way, they began somewhat similarly, very incompetent in public utterance. You remember, for example, that Moses, like Patrick Henry, began with a timidity almost beyond belief and even argued with God that he didn't have the power of utterance to proclaim the faith of his people at the court of Pharaoh. Yet Patrick Henry attained superb competence of oratory; his position, I think, will never be shaken.

Mr. Jefferson said one very curious thing about Patrick Henry. It strikes me as an enigmatic, but definite, tribute to him. Mr. Jefferson said of Patrick Henry: "When he had spoken in opposition to my own opinion he produced so great an effect that I myself have been delighted and moved. I ask myself when he speaks: 'What the devil has he said?' I could never answer that question."

That is not one of the essential qualities of the great orator, that nobody has been able to recapture what he said when he got through; but it was Mr. Jefferson, in a far less critical mood, who said that Patrick Henry spoke as Homer wrote.

I think too we can bring him back to life by remembering that the men who spoke of Patrick Henry's inconsistency overlooked one fact, that he not only made a great contribution to freedom, manifested a singular consecration to freedom, but had a great vision of what freedom is. He never faltered in his allegiance to it and I don't think his eyes were even clouded.

It was the principle of freedom that excited him and enlisted the energies of this marvelous combination of mind and voice and person that made him probably the most irresistible speaker America has ever heard. It was the principle of freedom, because when we come to think about it the tyranny against which Patrick Henry protested, certainly compared to the tyrannies that we have known in this horrible age when despotism has become uglier than it has been for a long time, the tyranny of his day was mild. We have had the bitterly unfair textbooks, of course, but the England that permitted Burke and Fox and Pitt to speak their very minds could never be in the same category of political cruelty with the tyrannies against which we have struggled. It was probably a minor question that aroused Patrick Henry to deathless utterance, but the principle of freedom was the thing in which he was interested. And when the principle was violated the degree of the violation was not the point that commanded his enormous enthusiasm. I suppose if he had one thing to say to us today it would be about the principle of freedom, and perhaps with this further thought that the subtleties of despotism forever challenge the mind as well as the courage of the free man: the subtleties of despotism, because despotism can wear many vestments and some of them can be glamorous and attractive.

We like progress as we call it, but we must watch for the subtleties of despotism; the despotism we have today—the despotism of today really expresses itself on its face in phrases of ennobled purpose—the enslavements necessary to accomplish these idealistic things are explained by the diabolical promulgation of the philosophy that the end justifies the means, and I don't know a more dangerous philosophy than that. Yet there are people who tolerate, defend, endure, are committed to the as yet undetermined fulfillment of this petty dream of heaven to be reached only by a totalitarian hell.

I know of no despotism more terrible.

Despotism can sometimes wear even the lovely vestments, let us say, of the Sisters of Mercy, and again use, as the Devil himself would cite scripture, the strongest and most persuasive slogans of our social obligations.

How grand a thing is security! What a beautiful word in its derivation, to start with. How exultantly it thrills us in the Christ-likeness of divine qualities. How can you conceive of a world without security? How magnificent a thing is security!

A young man starting out in life, walking in the fear of God and in the discharge of duty, reaches his hand even across some chasm to a girl, whatever may be the width of that chasm, and with clasped hands they go down the years, living for themselves and their children and their grandchildren, thank God, and for eternity. When the Great Teacher sought to show us the nature of God

and heaven he used as comparable symbols the family figures, father and mother and brother and sister.

How beautiful is security and how dangerous is a despotism in which security becomes translated by law into a security that goes far beyond social obligation for the unavoidable circumstance and undertakes to give people security that they have not earned!

Someone has said that the best test of a people is their behavior after the close of a tremendous war, whether it is victorious or defeated, successful or unsuccessful, when the stimuli to expanded industry no longer exist, the emotional strain is gone, the shooting and the tumult die; then you find out what kind of people they are.

I like to think that one of the greatest generations of people that ever lived in the world were the Southern people after the war of the 60's which they lost completely. Defeated, their money gone, their centers of credit gone, their processes of earning wealth gone, their citizenship and legal rights denied, a dependent and primitive people lodged upon them for support and sometimes exalted above them in authority, they went to work.

I am very proud, not that we lost the war—I am glad we lost the war, so far as that is concerned—but I am very proud that under that terrible test, the generation ahead of mine, including my parents, proved themselves to be people like that.

The story was not so happy after World War I, which was a victorious war. I read a history of the United States after the '60's and when the historian came to the summary of 1920 he gave that chapter this heading: "The Renunciation of Responsibility".

It was a great story after the Revolutionary War because the best men and the best minds in this country became tremendously concerned about government, differing as they did, but passionately apprehensive and unselfish as to what kind of social order should flourish under their government. The best minds in the country realized that the greatness of America was not merely that we won that war, but that after the war the principle of freedom was incorporated in a great nation.

And the story after our war remains to be written. One man has already said that the chapter—five years of that chapter have gone now, and God grant that he is utterly wrong, that he knows not what the heading of that chapter will be when it is written by some future historian —that chapter, he says, will be headed: "The Forfeiture of Freedom". Well, not if Patrick Henry's spirit is here with us.

Perhaps because I was an English teacher—you have surmised that I was never a history or a law teacher —I find myself to this day caught by the unescapable force of a single word, aptly used, or maybe of a single image created by few words. An example occurs to me in a fragment of Southern poetry. The romantic tradition of this poem is that it was written in about fifteen minutes after the wires had carried the news of the death of the Confederate general, Zollicoffer; the tradition further affirms that the lines were dashed off while the presses of a Mobile paper waited for some tribute. It was Henry Lynden Flash who wrote the four verses, beginning with a somewhat conventional eulogy to the heroism of a man who was always first in response to dangerous duty.

The powerful utterance, it seems to me, is in a hint of the entrance of Zollicoffer into heaven where he finds

for his soul's sustaining,
The apocalyptic eyes of Christ.

Just that was his ultimate, adequate reward, a glance into the prophetic eyes of his Master. But even on earth I have seen apocalyptic eyes.

We who deal in education and you who have children and grandchildren will never escape from the apocalyptic quality of the eyes of the youth with whom we are privileged to associate. After this war we may have our last chance to write a good chapter. Certainly, after this war we must hear again the words of Patrick Henry that there is something sweeter than life and something larger than peace, and, if I may be bold enough to interpolate, something safer than security: it is the liberty of every individual as a citizen of a free country and as a child of the Eternal God.

Francis Pendleton Gaines has been President of Washington and Lee University since 1930. Born in South Carolina, he was educated at Fork Union Academy, the University of Richmond, the University of Chicago and Columbia University. He is the author of several books dealing with the South.

Dollar Shortages and Communism:

How Much of an Answer Is ERP?

by **Louis C. Wyman** • of the New Hampshire Bar (Manchester)

▪ Mr. Wyman finds two cruel paradoxes in the European Recovery Program: designed to restore shattered European economy and to prevent the spread of Communism, the United States is spending billions of dollars that helps drain our own treasury and is producing competition for American industry, and, by further weakening our own economy, we may find that we have lost the cold war because of the very means we used to win it. He questions whether the insurance that we are buying against World War III is as good as some of the proponents of the Marshall Plan believe. Mr. Wyman travelled through eight European countries in the winter of 1948-1949 in his capacity as counsel to the Joint Congressional Committee on Foreign Economic Coöperation.

▪ Two years ago, so-called bipartisan sponsorship in Congress produced Public Law 472 of the 80th Congress, the European Recovery Program. Shortly thereafter, this same Congress passed another law appropriating nearly six billion dollars from the public treasury to Paul Hoffman's ECA, the administrative agency established to spend this money. While many Congressmen and Senators had serious doubts concerning the effectiveness of the new venture in foreign policy these doubts were subordinated to the appeals perhaps best represented by Senator Vandenberg's argument that ERP was a "calculated risk", would cost far less than even a few months of war, and would so revitalize the peoples and economies of participating countries as to assure healthy trade prospects for many years after 1952.

Since then, with a few minor amendments, additional billions of dollars have been voted to keep the program going until June of this year. Soon Congress will be asked for still more billions. The plan is to keep on with ERP until 1952, on which Target Date, our European friends are supposed to be able to get along and make both ends meet without further gifts from us. This policy is basically designed to gain political advantage for Western Democracy through a process of unification of Western Europe that, by achieving healthier economies, is to encourage independence in Europe for those countries that voluntarily participate on a basis of self-help and mutual coöperation.

The plan reads well. There can be little quarrel with such objectives. Nor is there much room to doubt the need for real concern on the part of the greatest creditor nation surviving World War II that it should have able customers on the two-way street of international commerce. And being a dollar-rich country (passing for the moment the dismal national debt) what more natural than to turn to something similar to international pump-priming with dollars? Pump-priming is a familiar procedure for Uncle Sam. There has been quite a bit of it since 1932. And it may be warranted —provided there is water in the well.

Plan Includes Twenty Nations

In setting up the program it was made clear in the legislation that any country in Western Europe, together with its dependent areas all over the world, might come in for a share of ERP dollars by subscribing to a joint program for European recovery. A frank appeal was thus made to the Russian satellites to join the Western Bloc, which most if not all would undoubtedly have done had they independent preferance. Still, leaving them out of the picture entirely, some twenty nations have since banded together and formed their own committee to divide the dollars among themselves. This committee is known as the Organization for European Economic Coöperation (OEEC) and it has elaborate headquarters in Paris. This is the chief agency through which any real mutual coöperation must be gained. This is the same group that has already estimated that a gap of three billion dollars will remain be-

tween what Europe must import from dollar areas and what dollar areas will pay for Europe's exports in 1952-1953 after ERP is over. Obviously something more than ERP is in the offing if any real attempt is to be made to reduce the 50 per cent excess of exports over imports that was the pre-World War II pattern.

I think there are two observations that can safely be made right at this moment. These are, first, that Europe is *not* going to be independent of outside aid by 1952 whether ERP is continued as projected or not, and, second, that average American citizens must face the fact that their noses and their pocketbooks will be occupied in the internal affairs of foreign nations all over the world for many years beyond 1952, if not permanently, until such brighter day when some semblance of an effective world government is in existence. This admittedly is pretty much utopian in concept as long as Communist Russia plots her world revolution of the proletariat, specializes in manufactured campaigns of hatred, shoots down unarmed American patrol planes and refuses even travel within Russia by Western peoples, to say nothing of atomic inspection or anything approaching a partial delegation of sovereignty.

The whole European recovery picture is unfortunately complicated by the knotty thorns of the East-West struggle. Time and again when suggestions directed toward businesslike efficiency or specific commitments or more contracts and fewer gifts have been made, they have run smack against the vulnerability of such moves to the Communist propaganda line that the United States is imperialistic. Millions of dollars have thus been yielded as sacrifices to avoid supposed ill-will. Millions given to ERP nations have provided means and material for their continued trade with the Soviet Union. Many of these ERP exports would be patently helpful against this country if war should come. In fact the whole program is one in which none of us would invest our own money on a return basis. The Government has had to do it with dollars taken from us under the taxing power, with the claim that since we have the responsibility for world leadership something must be done to exercise this leadership and that ERP is it; that ERP is the best way to contain Communism and that we have only two alternatives, containment or war. Thus, containment of Communism has become an intangible but real part of American foreign policy, and millions of dollars have been spent to "educate" the average American citizen to support this first prong of containment—the European Recovery Program. Even today the epithet of "isolationist", "reactionary" or "blindmen" is quickly fixed to those who take a dim view of these outpouring billions although it is common knowledge that in many demonstrable aspects our Marshall Plan spending thus far has been unbusinesslike to the point of profligacy. Some little idea of the amounts involved can be gained when you consider that under this program we have been giving away tax dollars at the astounding rate of $500,000 an hour!

ERP Is Not Merely Defense Against Communism

Now, of course, there are other impelling reasons for aid to European countries than mere anticommunist defense. It is quite obvious that if the dollar is to be a common-denominator of world trade, those who trade with us must have dollars with which to buy from us or they will soon devise some other basis for their currency. In a very real sense it is true that if we want to sell instead of give, we must buy. Thus, much has been made of the "dollar-shortage" in Western Europe and of the need to rebuild the economies of these countries so that they can earn their own way by making goods or producing raw materials that can be sold in the United States. And a goodly percentage of the latest ERP billions has gone to build just such foreign productive capacities. That is one feature of the Recovery Program that I hope we shall never lose sight of in spite of all the arguments that are made with reference to other matters—that is, the basic working plan designed to build and equip factories in Europe that will in turn produce either finished products or raw material *to be sold in America.* Beyond food, sustenance and foreign currency underwriting, this is what ERP appropriations are chiefly doing from here on out in the program. In the language of the recent Commerce Mission of ECA, headed by Wayne Taylor, the American taxpayer's interests lie in closing the dollar gap as soon as possible through this very process of stimulating expansion of exports of goods from other countries to the United States, helped by expansion of United States foreign investment.

All this would perhaps be splendid (so long as essentially noncompetitive) if it were not for the one little difficulty that we are, in the process of doing all these things, spending more dollars than we have coming into the Treasury. It looks like seven red billions more this present fiscal year. And just as certain as this is the twentieth century, the longer we do this the nearer we are coming to the dark day of devaluation of our own United States dollar here at home. Holders of insurance policies, savings accounts and government bonds know full well what devaluation of our own dollar means to their futures and to their children's futures—if they think about it. When we operate in the red in the national budget there must either be more deficit financing or higher taxes —one or the other. There is no third way. Under the familiar principles of the law of diminishing returns, higher taxes would quite probably mean less revenue in the long run, and more deficit financing means an ever-pyramiding national debt.

Budget Must Be Balanced in Next Fiscal Year

For example, it was long ago openly predicted by government leaders that the deficit for the current fiscal year would likely be more than five bil-

lion dollars. This year is now gone by as far as present cutbacks go. But we must plan for fiscal 1951, and in this planning each of us can do our individual part by talking this over with friends and urging everyone we know to demand a balanced budget for this next fiscal year. Even a balanced budget would not mean that one cent is going to be paid off on the national debt. But it would mean that there will be no further mortgaging of our dollars beyond the two hundred and fifty-six billion dollar mortgage of our present national debt.

It is curious that this goliath of a budget that we have in this great nation should have so many fixed demands on it that even the four-fold-increased costs of local federal government are less than one-quarter of the annual cost of taxes. Think of it! Out of forty-two billion dollars, nearly fourteen billions are for the military, several for veterans' aid, five and a half for interest on the national debt, and seven billions for foreign aid. For all the functions of government of the United States in this present fiscal year there is less than nine billion dollars left. And interest on the national debt earns nobody anything to speak of. The Government doesn't pay taxes! We tax ourselves to pay ourselves and charge ourselves a pretty penny for doing it! It is hardly a sensible process.

There is no doubt that as a part of our burden of responsibility for leadership in foreign affairs we should continue to make carefully planned "investments" in foreign aid in the nature of "inoculations against communism". And we must do everything we can to ensure an economic environment in which these inoculations can "take". But last year we spent $547,000 an hour on Western Europe alone. This year it is nearly twelve million dollars a day, and we have lost China. Not that any Marshall plan for economic aid to China would have helped protect that war-torn country against the Russian-inspired, Russian-armed Chinese Communist hordes. Far from it. Just as General Wedemeyer said in his long-suppressed report to the President of the United States (originally submitted nearly three years ago, and not disclosed to Congress or the American public until the disgraceful White Paper) the answer is almost exclusively military. Rice is vital to starving millions, but I suggest—with no claim to originality—that to stop the Russians in the Far East, if that is ever to be done at all, will take an open military threat from us. Economic programs are not now the answer in the Orient. No economic program can ever work effectively where men's minds and souls are not free to make a choice. One becomes grim in thinking of the consequences of the lack of forthright American policy in the Far East as the lines are drawn in Burma, Indo-China, Siam, or India. Let us entertain no delusions that the present Russian government can be trusted to go no further, with rubber in Malaya, oil in the Dutch East Indies, and jewels in Maharajahs' palaces.

Harris & Ewing

Louis C. Wyman graduated from Harvard Law School *cum laude* in 1941. After a year of practice with a law firm in Boston, he was commissioned in the Naval Reserve and saw service in the Pacific and Alaskan sectors. He has been counsel for several congressional committees since the war, returning to private practice in 1949.

ERP Is Presently Inapplicable to Far Eastern Situation

ERP has been and still is an expensive temporary palliative which in Europe it is hoped will give the patient enough economic strength to make a permanent comeback under his own power. It is a dollar inoculation in areas where there is still the luxury of time. It has not struck at the root causes of the European economic dislocations which themselves are fertile sources of pro-Communist feeling. It is presently inapplicable to the Far Eastern situation. But it violates every tenet of common sense to concentrate on surgical repair of one leg while the other is eaten, perhaps beyond repair, by the gangrene of Communism. What is to be our policy in the Eastern world? Somewhere, sometime—and the sooner the better for us—this great America must be prepared to risk World War III by drawing a firm line beyond which no further Russian-inspired guerrillas, terrorists or soldiers will be permitted to pass. That line should be fixed, it should be definite and the promise to use force must be immediately effective if it is crossed with military forces. In a measure we have done this in Greece —with Greek troops and at a great dollar cost for a tiny yet strategically important country. Until a line is drawn it is hard to see a future of much real economic progress anywhere in the Far East or a shield behind which we can fashion firm ground for economic programs. Behind that line once drawn by power, we must fight the more subtle battle for the possession of the minds and hearts of men and women yet free to make a choice. Without coercion but with vigor and careful foresight we must slug it out on paper and in debate with the reds, the pinks, the punks and the intellectual visionaries whose planning for utopia could stand a goodly dose of pragmatism. Too many of our foreign policy planners fail to take into account the tremendous disadvantage we labor under in the propaganda theaters. Even with Marshall-plan dollars and

the help of some (but far too little) labeling of ERP goods it is now a known fact that all too few European plain people know the truth about American help. There is no room for struggle by mind or matter once the iron curtain is dropped: Czechoslovakia, Hungary, Poland—the illustrations are legion.

Japanese Occupation Presents Dilemma

Take the Japanese situation. We cannot continue to carry the Japanese economy forever at a charge of five hundred million dollars a year. Japan must trade somewhere. Its people have to eat or there will be internal unrest there, in spite of General MacArthur. So, we started the "occupation" and we shall continue to foot the bill. But while we do this because we know Russia would walk in if we walked out, we also know, deep down, that we cannot keep this up forever. There has got to be an end to occupation some day. When is that to be—with Russia becoming more and more truculent and Russian-American relations increasingly precarious? Containment of Communism on the economic front is a mighty expensive business. Its costs can and will mount to astronomical proportions if the containment is unbusinesslike. The chief valid criticism of ERP is that it has been wastefully unbusinesslike.

We've got to be careful of all these bills we're taking on. Everything can be lost, not only to ourselves but to all freedom-loving countries, if the United States goes broke in this process of building fences for Communist fifth columns to burrow under. Common sense tells us we cannot even continue military spending forever at fourteen billions a year. Certainly we cannot continue indefinitely spending added billions more on foreign gifts. One or the other has got to yield sometime soon. Which shall it be?

In our democracy each of us is certainly entitled to his own personal convictions on these questions. There are many in high places that sincerely believe that we should keep on with our foreign giving even if it means mounting debt and higher taxes here at home. They feel somewhat as though ERP was political insulation against Communist war aims and that we should start our economy programs in other places than at the expense of foreign aid. These proponents of foreign economic aid would even cut back public works and reclamation projects in the United States before cutting back present levels of foreign giving.

If the European Recovery Program were a model of administrative efficiency, geared to completely sound economic methods and practices, and if it were reasonably calculated to leave Western Europe on two strong, fully-nourished, economic feet by 1952, there might be some added weight to this position with the thought that we are paying a premium on an insurance policy against World War III. Subject to the "calculated risk" of failure, we are doing this in a measure, of course. But only to a certain extent. For there is every likelihood that so long as we keep up with billions of free handouts, for just that long our foreign friends will postpone the ugly but necessary internal reforms they would have to attend to without the props of Marshall Plan dollars, *e.g.*, coal production in England or genuine tax collection in France and Italy.

Let it be borne in mind that just as there is nothing sacrosanct about 1952, neither is there any golden crown of untouchability on the lid of foreign appropriations. There is ample room to reduce the amount of governmental gifts of tax dollars to other foreign governments without killing either the Recovery Program itself or so crippling it as to render it completely ineffective. Those who maintain the contrary perhaps overlook the major premise of proponents of ERP at its present level that industrial targets and established OEEC objectives are not themselves subject to revision. They can be revised. There is waste and water in the Program that should be squeezed out by firm intelligent hands. We cannot and should not undertake to provide from deficit borrowing or higher taxation the means with which to enable foreign governments to live as they would like to live. Surely we are not so vulnerable to the emotional appeal of humanitarianism as to be easily convinced that this program, involving billions for us but less than 5 per cent of the total gross annual product of the participating nations, is either the salvation of European financial troubles or a permanent insulation against Communism.

There is talk of more hundred millions to underwrite a revolving European Payments Union, with new millions for backward areas. And Mr. Hoffman of Studebaker, U.S.A., would keep the tariff walls down and let foreign manufactured goods into this country (at 1/3 to 1/2 the labor cost) even if it means many more Waltham Watch cases and subsidies to hard-pressed American industries to change their line of business. Shades of the Brannan Plan! Is there any real prospect of occupational or removal parity for industry? If there is, woe be unto the sore-pressed American taxpayer for he will have paid not twice, but three times for his European bounty.

There are certain fundamental propositions that the American people in the protection of their own interests here at home should insist upon in connection with this business of foreign recovery programs. Let me enumerate just a few.

While we should not, for political and economic reasons, go so far as to insist that our budget be balanced by eliminating all foreign aid, recognizing that in the interests of our own collective security we must continue to interest ourselves in the need for strong non-Communist nations and good customers for our future export trade. We nevertheless should reëxamine closely the method of the program itself, asking:

A. Are we not spending more than is necessary to accomplish basic objectives, considering our own astronomical national debt and unbalanced budget?

(Continued on page 508)

A Change in the Old Order:

England Streamlines Her Jury System

by **Barnett Hollander** • of the New York Bar (New York City)

▪ During the shortage of manpower in the dark days of World War I, England suspended the grand jury, an institution that dates from the days of Norman England. The revival of the grand jury in 1922 proved that it was "effete", to use Mr. Hollander's word, and it was abolished for almost all types of cases in 1933. In 1949, after another great war, Parliament abolished the special jury—a jury of experts somewhat like New York's "blue ribbon" jury. Both these changes were nonpartisan and were made with little or no opposition. Mr. Hollander describes their departure in this article.

▪ I have used the idiom of the day to indicate two great changes:

1. Abolition of the grand jury (with a narrow reservation);

2. Abolition of the special jury (with a vestigial reservation).

For the purpose, legislation was needed; it was nonpartisan.

The grand jury had once been suspended in March, 1917, as a war measure. It was revived in February, 1922, and abolished in 1933.[1]

This legislation should be evaluated by viewing it against the background of public opinion in general and professional opinion in particular. It is not within the planning of this article to contrast this legislation with possible trends in other countries; it is difficult to resist an excursion into the fascinating field of comparative law.[2]

Public opinion is so frequently reflected in satire[3] that I cannot refrain from quoting Sir Alan P. Herbert (much better known as A. P. Herbert) in his *Uncommon Law;* in *Rex* v. *The Commissioner of Metropolitan Police,* he quotes from the address to the jury of "Mr. Justice" Swallow (and therefore a High Court judge):

> Gentlemen of the Jury, the facts of this distressing and important case have already been put before you some four or five times, twice by prosecuting counsel, twice by counsel for the defense, and once at least by each of the various witnesses who have been heard; but so low is my opinion of your understanding that I think it is necessary, in the simplest language, to tell you the facts again.

However, the author does not suggest other than the jury's slowness in reaching a just and proper verdict. The last sentences of the report of this "trial" are irresistible:

> And if you find, as you had better find, that . . . , then you will return a verdict of "Guilty". If, on the other hand, you find that, on the weight of the evidence, adding one thing to another and taking this away from that, looking upwards and downwards and sideways and all round, they have not been guilty of the acts alleged, then you will return a verdict of "Not Guilty"; and I shall ignore your verdict.

I now turn to quote our revered author of *The Common Law,* Mr. Justice Holmes, who (page 124), at least inferentially, prefers fact finding by a judge to a jury:

> A judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community in ordinary instances far better than an average jury. . . . Furthermore, the sphere in which he is able to rule without taking their opinion at all should be continually growing.

Jury Is Ancient in English Jurisprudence

Professor Holdsworth, the historian of English law, tells us the jury method was brought to England by the Norman kings[4], nearly a thousand years ago. Holdsworth points out that Fortescue writing in the latter half of the fifteenth century in praise of the laws of England states[5] the jury system had come to be regarded as the most valuable feature of that common law of which all Englishmen were proud. Successive commentators and judges have continued to give like praise[6]; and for the American view, what greater au-

1. 23 and 24 Geo. V, c. 36.

2. This being an article for a magazine, I am allowing myself a discursiveness and informality that would be inept in a law review.

3. "But great satirists have always had a serious purpose"—Lord Justice Atkin.

4. 1 Holdsworth, *A History of English Law* (6th ed.) 312-313.

5. *Id.* at 320.

6. "Fortescue, Coke, Hale, Blackstone and Stephen are witnesses whose evidence should be conclusive"—*Id.* at 348.

Barnett Hollander was born and educated in Lancashire. He emigrated to the United States, continuing his education at the College of the City of New York and at the New York University Law School. Admitted to the New York Bar, he established a branch office in London in 1925, where he became a member of the Middle Temple. He now spends the greater part of his time in London. Author of several books, he has been a member of the Association since 1942.

thority can there be than the Declaration of Independence, which states as one of the "injuries and usurpations" by George III: "depriving us in many cases of the benefits of Trial by Jury."

When the bill to abolish special juries was reached in the House of Lords—one of infrequent opportunities for the legal members to speak from actual experience—speeches were made by Lord Chorley for the Government; Viscount Simon, formerly the leader of the Bar and later Lord Chancellor; Lord Goddard, the Lord Chief Justice; the Marquess of Reading; and Lord du Parcq, all concurring. Their views of the past and present common jury should not fail of quotation, even at the expense of repetition and tediousness (Hansard, March 8, 1949, House of Lords, columns 178-202):

> LORD CHORLEY: There is no need for me to discuss the manifold merits of the jury system as developed in this country in connection with both criminal and civil trials. It has been called the palladium of British liberty.
>
> VISCOUNT SIMON: . . . the fact that you have a number of citizens on a jury . . . has the result that it tends to cancel out or to mellow the isolated extreme view which perhaps one man would form. [Of course, referring to a trial by a single judge.][7]

Continuing and quoting from the recent autobiography of Sir Patrick Hastings, who had just retired from practice after an outstanding success of a great many years as a jury lawyer (he was the acknowledged leader of the common law bar, but did not confine himself to jury trials, and a former Attorney General), Lord Simon read:

> "The jury-box, which is their temporary home, contains twelve members of the most rational and sober-minded nation in the world. Their one desire is to see that justice, as they understand it, shall be done between two people who have placed themselves unreservedly in their hands. They are ignorant of law, but in their united wisdom they are fully acquainted with the dangers and tribulations of ordinary human life. They are patient and generous to the advocates who appear before them, but are properly intolerant of anything which they think is in the nature of a trick. They will listen at any length to common sense, but become restless under verbosity; they become irritated by an ill-timed jest, and above all they detest the slightest attempt to bully either a witness or themselves. But as a tribunal for dispensing justice they are absolutely without equal."

This very experienced advocate goes on:

> "During all the years that I have practised before them I hardly remember a single instance in which they were wrong in the decision which they gave. They have often been against me, and upon those occasions I have been properly annoyed, but upon thinking the case over, as I always did, in the end I have come to the conclusion that they were right. Their verdict may not have been strictly in accordance with that which we know as the law of evidence, but according to the law of justice and common sense there was no fault to be found with the decision at which they arrived. I am satisfied that in the end twelve ordinary English men and women sitting together form the best tribunal that civilisation has yet devised, and any legislator who seeks to curtail the activities of juries does a great disservice to the nation.
>
> "I must say that that expresses the view that I have been led to form."[8]

American judges and lawyers are bound to be surprised by the words of the Lord Chief Justice (Hansard *supra*, column 193): "I doubt whether there are now one hundred cases in a year tried by jury—either special or common." Of course, he did not refer to criminal cases. His experience extends over fifty years, and a Lord Chief Justice sits in every kind of trial, small amounts as well as large amounts, in London and on circuit, besides presiding over the Court of Criminal Appeal.

Lord Justice du Parcq hoped that juries would more frequently be employed and

> I have never felt such complete satisfaction with the result of cases which I have heard as when I had the assistance of a jury. Sometimes I have had a doubt as to the wisdom of my own de-

7. It is not inappropriate at this point to quote Lord Simon on the rarity of challenging jurors in England:

> I have often taken a barrister or a lawyer from the United States round our courts. The thing that astounds him is that one does not hear anybody challenge the jury, whereas in some parts of the United States there appears to be quite an elaborate inquiry first as to whether an individual citizen, if he is put in the box, is a person who, because of his ancestry, his opinions, his previous knowledge or his relations, is likely to do justice. We never do it in this country. I have only once seen a juryman challenged in a court. It was in a criminal case.
>
> Many years ago the late Chief Judge of the New York Court of Appeals, Lehman, then a *nisi prius* judge of the Supreme Court of that state, with whom I was riding towards home, told me of a most surprising incident in his court that day. In the library of the New York Bar Association he had casually met a British lawyer and had asked him to view a New York trial. He had accepted that day and was invited to sit on the bench by Judge Lehman. While a jury was being impanelled he noticed the lawyer's marked agitation. He asked Judge Lehman if counsel was actually going to challenge a juror. Judge Lehman with casualness said that obviously was just what counsel was going to do and asked the reason for his surprise. The answer was that he knew it could be done in England, but in thirty years of practice it was the first time he had seen it.

8. I have been reading another book by Sir Patrick, who is also a playwright of stature, just published. At page 228 of *Cases in Court*, he says "An English jury is seldom, if ever, wrong. In my opinion twelve ordinary English men and women sitting together form the best tribunal that the world has ever known". Within my experience a busy English trial lawyer "does" more trials than his American opposite because trials in England are fashioned to take less time, and trial counsel will frequently participate to a greater or less extent in more than one or even several cases then actually on trial.

> cisions on questions of fact, but I do not think I have ever had a doubt as to the decision arrived at, when I have summed up a case, by a jury.

He referred to like views of eminent and experienced judges.

During World War I, on the grounds of saving manpower, new rules were made, so that today juries are restricted to actions for libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise.

Grand Jury Was Abolished During World War I

To repeat, the legislation abolishing the grand jury met no party opposition. So long ago as 1913, a committee for procedural reform recommended the abolition of the grand jury. But not until the economies in manpower and in public expenditure became compelling by World War I was the grand jury suspended –from March, 1917, to February, 1922. Thus a period of five years allowed for trial and error. Agreement was general that it wasted the time of grand jurors, witnesses, the accused, the judges, officials and counsel, and involved large pecuniary loss. Juries, which were introduced by the Normans as a body of neighbors sworn in,[9] were constituted into grand and petit juries[10] and the former made up of twelve to twenty-three.[11]

Though now almost academic, it is interesting to note that since 1305, the King or Crown could only challenge for cause[12] while the prisoner had from twenty to thirty-five peremptory challenges.[13]

The revival of the grand jury from 1922 to 1933 proved it was effete.[14] However, there was reserved by the Act treason committed abroad and certain offenses in connection with official acts.

Nonpartisan Legislation Abolishes Special Jury

The abolition of the special jury was accomplished by nonpartisan legislation[15], which *excepted* "a City of London special jury in a case entered in the commercial list for trial at the Royal Courts of Justice in the King's Bench Division of the High Court". The "City of London" is that square mile of legal entity, a city within the London we usually refer to, as though "Wall Street" were a separate borough of the City of New York.

The "special jury" was constituted from those legally entitled to be called esquire[16], or those that are higher and generally are occupiers of the more highly rated residential premises or farms, and bankers and merchants.

According to Holdsworth, "Juries were summoned from those likely to know. Thus we have a jury of Florentine merchants living in London summoned to decide as to an act alleged to have taken place at Florence; and a jury of cooks as to the quality of food sold".

The special jury had its resemblance to the jury of the same designation in New York[17] and to those described frequently as struck or blue ribbon juries. The Lord Chief Justice stated on the debate that the first special jury was sworn in 1645, both sides, merchants, having asked for a jury of merchants.

It remains possible to transfer a case to London to take advantage of the special jury.

Debating for the Government, Lord Chorley made the statement that "it is now over thirty years since a special jury has in fact been impanelled to decide a criminal case" and Lord Reading pointed out:

> It may be a little ludicrous to preserve nowadays the question as to whether a person shall be a special or a common juror, in days when most of the people who used to inhabit the larger houses are living either in their own or some one else's garage or gardener's cottage.

It should not be thought that juries have been reduced to a single class though the recent legislation expressly enacts (Section 20) "common jury" and "common juror" as expressions not to be used. There remain Royal Household juries, sheriff's juries, coroner's juries[18] and petit juries[19]. The judge may order a jury entirely of men or of women.[20]

In civil actions peremptory challenges are not allowed.[21] In criminal trials the prosecution is not allowed any, whereas the accused is allowed twenty (in treason thirty-five). Since 1305 the Crown may challenge for cause only.[22]

In felony trials each juror must be sworn separately; in other trials three or four join in holding the Bible.[23] The rule of unanimity has obtained since 1367.[24] Prior to 1870, to hasten their deliberations they could neither eat nor drink until they had given their verdict.[25]

The *Daily Telegraph* of London of January 27, 1950, gave front page prominence to a trial for murder that has received wide publicity. The judge, like trial counsel, has had

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9. 10 Halsbury, *Statutes of England*, page 45.
10. *Id.* at 46.
11. *Id.* at 47.
12. *Id.* at 56.
13. *Id.* at 47.
14. 23 and 24 Geo. V, c. 36 (Administration of Justice Act, 1933). In the debate in the House of Lords, a number of the Law Lords made speeches. Said Lord Darling (87 Hansard [House of Lords] Column 1055): "With regard to the abolition of grand juries, anyone, I think, who has a liking for old things must regret to see them go, but one can hardly help recognizing that they have survived for a long time any real utility . . . they invariably act on the advice of the Judge." In the Commons, Sir Stafford Cripps, then one of the most successful King's Counsel, credited with both learning and clarity of mind, said (279 Hansard [House of Commons] Column 1607): "This archaic procedure has ceased to have any reality in modern days."
15. Juries Act, 1949, 12 and 13 Geo. VI, c. 27, in effect October 1, 1949. *Id.*, §18, retained to deal with important or difficult commercial problems of the financial center of the Empire. 19 Halsbury, *Laws of England* (2d ed.) 319.
16. Ten classes are mentioned in the *Encyclopaedia Britannica* as entitled to be called "esquire". That authority delimits those commonly addressed as "esquire" very greatly, admitting of the professions only barristers; "solicitors must be content to be known as gentlemen"—and American lawyers can salve their susceptibilities; they are esquires because of the merger of the professions.
17. New York Judiciary Law, §749-aa.
18. Coroner's juries are composed of not less than seven nor more than eleven jurors. 19 Halsbury, *Laws of England* (2d ed.) 281.
19. Six jurors for cases in lower courts.
20. Women became eligible in 1919 (Sex Disqualification Removal Act), though they sat as jurors generations earlier. *Blakemore v. Blakemore*, 71 Eng. Rep. 769 (1845). Writ *de ventre inspeciendo*. Knight Bruce, V. C., ordered: "Let the ordinary course be followed. The jury is a jury of women." 19 Halsbury 303.
21. *Creed v. Fisher*, 9 Ex. 472, 156 Eng. Rep. 202 (1854).
22. 19 Halsbury, *Laws of England* 306.
23. *Id.* at 310.
24. *Id.* at 316; 1 Holdsworth 318.
25. Halsbury 314.

vast experience in felony trials and this trial lasted seven days. The judge summed up for three hours. The evidence was circumstantial and both sides called experts. A torso had allegedly been dropped by the prisoner from his hired light plane in the Thames Estuary where it had been picked up. I quote from the newspaper report:

> At 12:30 the jury retired.
>
> At two minutes past three the jury, ten men and two women, filed back. Mr. Justice Sellers took his seat. . . .
>
> The foreman began to speak. 'My Lord, we are not agreed.' . . .
>
> Replying to the judge, the foreman said, 'I feel that it is doubtful that we shall reach a unanimous decision.' The judge told the jury he must discharge them.
>
> The jury filed out to a belated lunch. While considering their verdict the jury do not have refreshment.

Legal Advice by Radio

■ The Editors have received a copy of the following letter from Edwin M. Otterbourg, Chairman of the New York County Lawyers' Association Committee on Unlawful Practice of the Law and a member of the American Bar Association's Committee on Unauthorized Practice of the Law. The letter is self-explanatory.

To All Radio Broadcasting Stations in New York County.

Gentlemen:

The New York County Lawyers' Association, representing some 7,000 practicing lawyers in the City of New York, requests your cooperation in a matter of grave public concern.

Radio programs which give the public authentic general information about the law and the principles underlying law can be a valuable public service. However, this Association has been disquieted recently by complaints regarding certain broadcasts which have seemed to suggest that listeners, in dealing with their individual specific problems, could rely on offhand information or advice, which was offered, or on answers which purported to give legal advice in response to specific inquiries.

In several instances such programs have sponsored the sale of books purporting to supply ready answers to the various legal questions which may puzzle the individual in his daily life.

It is a fundamental fact in the science of the law that specific advice of this kind, which must ignore the special conditions which qualify every specific legal problem, may lead the individual who follows such advice into serious mistakes. The layman may discover the truth of this only after it is too late.

A program which is confined to the presentation of general information about the law can contain much of value to the listeners. Such a program, however, should never encourage the listener to attempt to apply the law himself without obtaining professionally competent personal advice, which should be given by the lawyer only after a careful analysis of a most complete statement of the specific facts.

We might point out that a proper and complete professional service is available to all. The Legal Aid Society maintains a staff of lawyers ready to provide this service without fee to individuals with inadequate income, and the bar associations, themselves, have established a legal referral service where general or specialized advice can be obtained at merely nominal fee.

A professional association such as this, dedicated to the cause of justice and the law, could not do otherwise than seek to protect the public, which our profession serves, from the consequences of any form of legal advice, which might endanger the welfare of the layman.

The courts have held it to be in the public interest to prohibit the giving of legal advice and opinions by lawyers through publicity mediums. The New York Appellate Division, First Department, has adopted the following rule:

> "Rule 1-A. Advice Through or in Connection with a Publicity Medium. No attorney shall advise inquirers or render an opinion to them through or in connection with a Publicity Medium. No attorney shall advise inquirers or render an opinion to them through or in connection with a publicity medium of any kind in respect to their specific legal problems, whether or not such attorney shall be compensated for his services. Any attorney who violates this rule shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 88 of the Judiciary Law."

In Brooklyn a similar rule has been adopted by the Appellate Division, Second Department. (Rule 7).

When in 1941 the subject was considered between the representatives of the National Broadcasters and the Committee of the American Bar Association, that Committee gave as its opinion that

> "A program should neither give nor offer to give legal advice nor by title or substance represent or lead the public to believe that it emanates from a court or is a part of the judicial system."

and reported to the American Bar Association that

> "As a result of these conferences, your Committee has had the assurance that the National Association of Broadcasters, through its many members, will cooperate to the end that programs will conform to the above opinion."
>
> (66 A. B. A. Rep. 153, 269 (1941))

Obviously, for a man to base his conduct or stake his fortune on advice given on a radio broadcasting program, may lead to most unfortunate results, whether such advice be given by a lawyer or a non-lawyer; if given by the latter it may constitute a penal offense.

The public policy of this State requires a long and thorough training in the law as an indispensable prerequisite to being permitted to practice law and give legal advice. The relationship between an attorney and his client is direct and personal, and communications between them are privileged. In this relationship the client has all of the benefits of the responsibility of the lawyer who gives the advice and further, all lawyers are required to conduct themselves in relation to their clients in accordance with rules of ethical conduct, infractions of which subject them to discipline by the courts. None of these safeguards for the public exists where, through a publicity medium such as radio, someone, either a lawyer or a layman, is permitted as part of a broadcast program to give legal advice on specific problems. The situation is rendered especially hazardous when it is considered that the law in one state may be different from the law in another state.

The air waves are no respecters of state lines.

We believe that the foregoing statement may be helpful as a guide to broadcasting stations and their sponsors, and this communication is sent to you in the hope that we will have your full cooperation.

Trading with Insurgents: The Problems of the Foreign Merchant

by **Robert Delson and Louis C. Bial**

▪ When insurgents are strong enough to be in *de facto* control of part of a country but have not attained the status of belligerents, the difficult and delicate question of rights of the foreign merchant arises. The authors of this article say that it is settled international law that he may trade with the insurgents. The authors believe that the fact that the *de jure* government may be physically able to prevent trade in an isolated case does not mean that the insurgents have lost control. They criticize the contrary decision of the United States and Mexico Claims Commission in the *Oriental Navigation* case. Mr. Delson, one of the authors, is a member of the New York City Bar. His strong convictions on the subject were undoubtedly acquired from experience as counsel for the Republic of the United States of Indonesia, a position that he still holds. Mr. Bial, the coauthor, has practiced law in Germany. He assisted Mr. Delson and Dr. Ali Sastroamidjojo, the Indonesian Ambassador to the United States, in preparation of the article, "The Status of the Republic of Indonesia in International Law", published in the *Columbia Law Review* for March, 1949.

▪ During the last few years events in various parts of the world, especially in the Near and Far East, have aroused international interest in the question of the legality of trading with insurgents. The problem is not new, but in view of its extraordinary importance and as it includes questions that are not yet definitely settled, this article will attempt to review the authorities and to arrive at some conclusions with respect to the issues.

An insurgency may arise from the attempt of a faction within a state to seize power over the whole state or from the attempt of the inhabitants of a part of a state, as, *e.g.*, a province or a colony, to win independence. In either case, if the insurgents seize power over a substantial part of the national territory, the questions arise whether foreign nationals may trade with them without violating the law of nations or the municipal law of the state against which the insurgency is directed, and whether such state may interfere with such trade under international or municipal law.

Where the insurgents have been wholly defeated or where they have been successful and have seized power over the whole state or won independence as a new state, as the case may be, the insurgency has come to an end. If a new war breaks out between the former mother country and the former province or colony, this is now an international war like any other war, not a civil war. The problems arising in an international war are not within the scope of this article.[1] If the insurgency amounts to civil war, the parties are belligerents and have the rights of belligerents, including the right to interfere with neutral commerce by establishing a blockade and by exercising the right of visit and search on the high seas.[2]

Whether Insurgency Is Civil War Is Question of Fact

Whether or not this is the case is a question of fact. Recognition of belligerency granted either by one of the contending parties to the other or by third states to the warring factions is evidence of the existence of a war. However, neither such recognition nor its absence is conclusive. The facts alone are determinative.[3] The facts that make a contest a civil war were well stated by Secretary of State Cass to Mr. Osma, Peruvian Minister, in his letter of May 22, 1858, where he said:

> The situation of the contending parties in Peru, and the avowed objects of the revolutionary leaders, together with the extent of their operations, and also the extent and importance of the portion of the Republic which they occupied and governed at

1. A recent instance of such a situation is the Indonesian war, started by Dutch invasion of the territory of the Republic of Indonesia in July, 1947. See, Delson and Sastroamidjojo, "The Status of the Republic of Indonesia in International Law", 49 *Col. L. Rev.* 344 *ff.* (1949). This war broke out after the republic had become a sovereign state, recognized by many other states including the Netherlands.

2. The Prize Cases, 2 Black 635, 67 S. Ct. 459, 476 (1863).

3. *Ibid.*

different periods of the struggle, made that contest a civil war.[4]

During the last civil war in Spain, all the Great Powers refused to recognize the contending parties as belligerents[5] although there is no doubt that the struggle amounted to war. Whether, by refusing recognition, the Great Powers violated international law, *i.e.*, whether belligerents have a right to be recognized as such, is a question that is not within the scope of this article.[6]

If Insurgency Is Civil War, Both Sides Have Equal Rights

The belligerent right of blockade has been defined as[7]

> A definite act of an internationally responsible sovereign in the exercise of the right of belligerency, and involving in such exercise the successive stages, first, of proclamation, secondly, of warning vessels, thirdly, of the seizure of vessels, and, fourthly, of adjudication of the question of prize by a competent court of admiralty.

Hyde further states:[8]

> To get the right of blockade as against neutrals it is not necessary that the party claiming it should be at war with a separate and independent power; the parties to a civil war are in the same predicament as two States which engage in conflict and have recourse to arms.

The same is true as to the right to visit and search, which is the right of a belligerent only and therefore may not be exercised in time of peace.[9]

If a state of war exists, both parties, the insurgents as well as the *de jure* government, have equal rights to interfere with commerce of neutrals by setting up blockades. And the converse is equally true: they do not have the right to interfere with neutral commerce except in the case of a legally established blockade. On this point there is general agreement. As Rougier[10] rightly says:

> *La controverse n'est possible que dans l'hypothèse où les insurgés ne sont pas reconnus comme belligérents.*

Therefore, the establishment of a blockade implies recognition, by the party establishing it, of the belligerency of the other party.[11] This is because the declaration of a blockade without recognition of the other party's belligerency would be tantamount to the announcement of an intent to commit illegal, if not criminal, acts (piracy).

There exists, it is true, the so-called "pacific" blockade. But it is generally admitted that this kind of blockade is directed only against the vessels of the blockaded state and that the "pacific" blockader has no rights against neutral shipping, except perhaps to turn it away peacefully. Neither the United States nor Great Britain has ever recognized the right of a pacific blockader to interfere with neutral commerce. On December 21, 1916, Secretary of State Lansing declared:[12]

> The Government of the United States adheres to its traditional position which has heretofore been set forth in relation to the Cretan blockade of 1897, and the Venezuelan blockade of 1902, that the United States does not concede the right of a foreign power to interfere with the commercial rights of uninterested countries by establishment of a blockade in absence of a state of war.[13]

Hackworth[14] says, referring to pacific blockade, that there is nothing exceptionable from a legal point of view "if no attempt is made to extend the measures to citizens and property of a third State".

Oppenheim-Lauterpacht[15] state:

> No unanimity exists as to the position of ships of third States in a case of pacific blockade. Some writers maintained that they must respect the blockade, and that the blockading State has a right to stop those which try to break it. The vast majority of writers, however, deny such a right. There is, in fact, no rule of International Law which could establish such a right, as pacific (in contradistinction to belligerent) blockade is merely a matter between the conflicting parties. The declaration of the Institute of International Law contains, therefore, the condition: "Les navires de pavillon étranger peuvent entrer librement malgré le blocus."

The *de jure* government will often deny any intent of establishing a blockade, *e.g.*, because it does not wish to recognize, by implication, the belligerency of the insurgents.[16]

But the right to interfere with neutral commerce even in case of civil war is not properly exercised unless a blockade is proclaimed with all its consequences, including recognition of belligerency. International law, like common law, does not permit anyone to take inconsistent positions. It tells the state: either you admit that a state of war exists, and in this case you may exercise belligerent rights, or you deny the existence of a war, and in that case you cannot claim belligerent rights. Therefore, if a *de jure* government wishes to hinder neutral commerce with insurgents but does not want to recognize the insurgents as belligerents, it cannot base such interference on international law.

May Interference Be Based on Municipal Law?

The question, and this is the heart of our problem, remains whether such interference may be based on municipal law. Oppenheim-Lauterpacht[17] state very correctly, referring to insurgency not amounting to civil war:

> A blockade instituted by a State against portions of its own territory in revolt is not a blockade for the purpose of settling international differences. It has therefore in itself nothing to do with the Law of Nations, but is a matter of internal police.

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4. 1 Moore's *Dig.* 43.

5. Lauterpacht, *Recognition in International Law* (1947) 235.

6. *Cf. id.* 236-238; 1 Hyde, *International Law* (2d ed. 1947) 200.

7. 3 Hyde, *op. cit. supra* note 5, 2183.

8. *Ibid.* 2186. See also Pleadings by Mr. Evarts, Attorney for the U. S. Government, in Prize Cases, *supra* note 2 at 465, and cases there cited.

9. Opinion of the Solicitor for the Department of State, January 9, 1924, as quoted in 2 *Hackworth Dig.* 663 f.

10. 1 Hyde, *op. cit. supra* note 5, 200. See also: *New York Times*, June 21, 1949, Report from Washington on "War Acknowledgment Seen", reading as follows: "State Department experts on international law expressed an off-hand view today that the Chinese Nationalist's blockade declaration carried all the earmarks of an acknowledgment that war exists in name, as well as in deed."

11. *Les guerres civiles et le droit des gens* (1903) 298-299.

12. For. Rel. 1916, Supp., 105.

13. For the Cretan and Venezuelan blockades mentioned in this declaration, see 7 Moore's *Dig.* 139.

14. Memorandum of the Legal Adviser of the Department of State, January 29, 1932, 6 *Hackworth Dig.* 156 f.

15. 2 Oppenheim-Lauterpacht, *International Law* (6th ed. 1940) 120.

16. If the insurgents do so, they usually claim to be belligerents setting up a blockade, no other justification of their act being imaginable. Regarding the validity of blockades set up by insurgents, cf. 7 *Hackworth Dig.* 169 f., 2 *id.* 695 ff.; 3 Hyde, *op. cit. supra* note 5 at 2183 ff.

17. *Op. cit. supra* note 14, at 119, note 1.

Mishkin Studio

Robert Delson is a native New Yorker. After completing his undergraduate work at Cornell, he received an LL.B. degree from Columbia in 1928 and now practices in New York City. He has been interested in the development of legal institutions in the Far East for a number of years and is counsel in the United States for the Republic of the United States of Indonesia.

The restrictions imposed under municipal law often take the form of a legislative or administrative act of the *de jure* government closing one or more ports occupied by the insurgents, *i.e.*, prohibiting neutrals from entering such port or ports for the purpose of trade. Sometimes such restrictions may take more subtle forms, *e.g.*, by requiring special licenses, or the payment of special taxes or duties; the restrictions also may take the form of trade, customs, currency exchange, sanitary or any other regulations, making the trading with the insurgents impossible or more difficult.

The validity of such acts has been asserted by some authors. Thus, Politis[18] states:

> *Tant que l'insurrection n'a pas pris, par la reconnaissance des insurgés en qualité de belligérents, un caractère international et reste une lutte purement interne, le gouvernement légal peut fermer tout ou partie des ports du pays par la voie d'autorité, par mesure de police, sans y établir, à proprement parler, un blocus.*

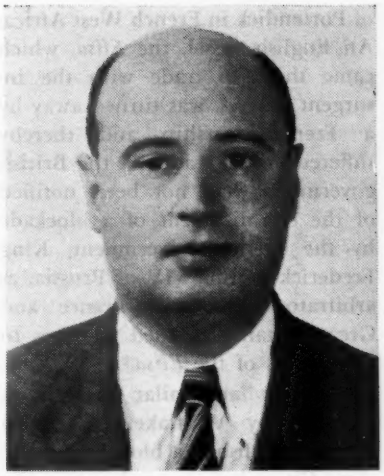
This has never been the point of view of the United States. Under the heading "Civil Strife—Closure of ports held by insurgents", Hackworth[19] quotes the following passage of a telegram addressed by Acting Secretary of State Wilson to the *chargé d'affaires,* Schuyler, on October 23, 1912:

> As a general principle a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extra-territorial effect in the direction of imposing any obligation upon the governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. If the sovereign decreeing such a closure have a naval force sufficient to maintain an effective blockade and if he duly proclaim and maintain such a blockade, then he may seize, subject to the adjudication of a prize court, vessels which may attempt to run the blockade. But his decree or acts closing ports which are held adversely to him are by themselves entitled to no international respect. The Government of the United States must therefore regard as utterly nugatory such decrees or acts closing ports which the United States of Mexico do not possess, unless such proclamations are enforced by an effective blockade.

This United States view was expressed by the Department of State on many occasions, as cited by Moore[20] and Hackworth [21], referring to incidents that occurred in Haiti (1908), Nicaragua (1910), Haiti (1914), Santo Domingo (1914), Mexico (1912), Brazil (1932), Spain (1936) and, most recently, in the Department of State's note to China of June 28, 1949[22].

The British point of view is well illustrated by the following quotation from Smith:[23]

> The only difference between a recognized war and an unrecognized revolution is usually to be found in the treatment of neutral commerce at sea or in port. If no war is recognized, the normal relations of peace are presumed to continue between the legitimate government and foreign States. From this it will follow that foreign shipping will enjoy its normal right of innocent passage through territorial waters and is entitled to claim such access to the ports as is provided for by the commercial treaties in force.



Louis C. Bial was born and educated in Germany, studying law at Freiburg, Munich and Frankfurt-am-Main. He left Germany in 1933, residing in Paris and Havana between 1933 and 1945. He obtained his LL.B. at Brooklyn Law School in 1947 and passed the New York bar examination shortly thereafter. He is the author of *Vergeltung und Wiedergutmachung in Deutschland* (1945) and a number of other publications and articles on international and foreign law.

Even some South American jurists, usually most favorable to the rights of *de jure* governments in cases of insurrection, so frequent in that region, have adopted this view. Podesta Costa[24] states:

> *Cuando el gobierno constituido ha perdido el ejercicio de la soberanía sobre determinada zona, no puede, a título de la soberanía eminente que conserva, obligar a la comunidad internacional a tener por clausurada dicha región.*

The rule is usually traced back to a statement made by Lord Russell on June 27, 1861[25], but it is actually much older. In 1834 and 1835 an insurrection broke out on the coast

18. *Le problème des limitations de la souveraineté et la théorie de l'abus des droits dans les rapports internationaux,* Rec. des Cours, 1925, 1, 1, 94.
19. 7 Dig. 166.
20. 7 Dig. 803-820.
21. 7 Dig. 126-127, 166-168.
22. 21 Dept. of State Bull. 35 (1949).
23. "Some Problems of the Spanish Civil War", 18 Br. Y. B. Intl. L., 17, 23 (1937).
24. *Ensayo sobre las luchas civiles y el derecho internacional* (Buenos Aires 1926) 136.
25. Quoted in 7 Moore's Dig. 809.

of Portendick in French West Africa. An English vessel, the *Elisa*, which came there to trade with the insurgent natives, was turned away by a French warship and thereby suffered loss of trade. As the British government had not been notified of the establishment of a blockade by the French Government, King Frederick William IV of Prussia, as arbitrator chosen by France and Great Britain, awarded damages to the owners of the *Elisa*.[26]

A somewhat similar incident is reported by Westlake.[27] In 1836 Russia established a blockade of her own Circassian coast because the inhabitants of that coast had rebelled. A British ship, the *Vixen*, was turned back, while ships owned by the rebels were seized and confiscated. This mild treatment of the British ship seems to indicate that the Russians were well aware of the fact that she was pursuing a legitimate purpose in attempting to trade with the insurgents. The British Government did not claim compensation, so that the question whether a claim existed for the mere turning away was not decided.

Another incident of this kind occurred in 1858 in Peru. In the course of an insurrection led by General Vivanco, the insurgents occupied part of the country including the port of Iquique. Two American ships were captured by a warship of the *de jure* government while trading with the insurgents at Iquique. The United States Government demanded compensation and an interesting exchange of notes followed in which the United States forcefully defended its position.[28] The parties finally agreed on arbitration and chose the King of Belgium as arbitrator, who however declined to act as such, stating in a confidential letter to the United States Government that he did so because in his opinion he would have had to reject the claim. This opinion is of course of little value as it fails to state the grounds upon which it is based. On the other hand, the well considered letters written by the Secretary of State in the matter are of great weight.

The view followed by the United States may well be regarded as the classic doctrine as it finds support not only in the authorities above cited, but also in many additional authorities.[29]

Undoubtedly the rationale for this view is that the municipal law of the country to which the insurgents belong remains in force in the insurgent territory only in so far as the insurgents continue to apply it; for the *de facto* government is the government for all practical purposes, according to the principle so aptly stated by Mr. Justice Holmes that "sovereignty is pure fact"[30]. To maintain that the *de jure* government has any right to enact or enforce laws and regulations concerning trading in ports occupied by the insurgents is therefore, as Rougier[31] rightly stated, to misunderstand the concept of sovereignty. Therefore, there seems to be general agreement that a neutral shipowner that sends his vessel into a port occupied by insurgents with the avowed purpose of trading with the insurgents does not act illegally in disregarding the rules established by the *de jure* government.

If such neutral trade with insurgents is not illegal, then it would seem to be a logical conclusion that the *de jure* government has no right to interfere with it.

Some authorities, however, while admitting that persons engaged in such neutral trade cannot be subjected to the penalties consequent upon blockade violation, nevertheless maintain the right of the *de jure* government to a limited degree of interference, namely, the right to prevent ingress and egress provided it employs effective means of enforcement. This view has been described by the United States Naval War College[32] as "a midway measure" between the view of Politis and the traditional view. Under the doctrine supported by Politis a simple port closure decree of the *de jure* government makes it illegal for foreign ships to enter the ports closed and exposes them to the sanctions imposed by municipal law if they violate a decree, even if the *de jure* government has no control whatsoever in the closed port. Under the classic view, such port closure decree is without effect in insurgent held ports, even if supported by force, in the absence of a blockade *jure gentium*. Defenders of the compromise view think that, if warships of the *de jure* government are present in the territorial waters adjacent to the territory occupied by the insurgents and have actual control of such waters, the sovereignty of the *de jure* government extends to these waters and such government may hinder neutrals from violating its laws. It may be noted that the proponents of this view do not assert that a blockade under international law is established by such port closures, and accordingly do not maintain that the sovereign is entitled to exact the penalties consequent upon violation of a blockade (such as visit and search, capture, and prize court proceedings), or that the closure is effective outside the territorial waters. They maintain only that the closure is valid as a domestic measure if enforced by effective means. This view was taken by the majority of the Claims Commission–United States and Mexico, 1928, in the case of *Oriental Navigation Company* v. *United Mexican States*.[33] During an insurrection in Mexico the insurgents had occupied the port of Frontera. The *de jure* government issued a decree prohibiting all ships from entering that port. Disregarding

(Continued on page 517)

26. Award of November 30, 1843, in Lapradelle and Politis, 1 Rec. des Arbitrages Internationaux (1905) 525 f.

27. 2 International Law (1913) 12, note 1.

28. 2 Moore's International Arbitrations 1593 ff.; 2 Lapradelle and Politis, op. cit. supra note 25 at 387 ff.

29. Cie. Générale des Asphaltes de France, Venezuelan Arbitrations (Ralston's Report) 331 (1903); Orinoco Asphalt Case, (loc. cit. 586; De Caro case, loc. cit. 810; Martin Case, loc. cit. 819; Wilson, 1 Am. Jour. Int. L. 55 (1907); Borchard, The Diplomatic Protection of Citizens Abroad (1915) 181; Ralston, The Law and Procedure of International Tribunals (1926) 406-408; Hall, International Law (8th ed. 1924) 42. But see as supporting Politis' view: Orinoco Steamship Co., Venezuelan Arbitrations (Ralston's Report) 95 (1903).

30. American Banana Co. v. United Fruit Co., 213 U. S. 347, 29 S. Ct. 511 (1909).

31. Op. cit. supra note 11 at 301.

32. International Law Situations (1938) 94.

33. 23 Am. Jour. Int. L. 434 (1929).

The International Bar Association:

Its Establishment and Progress

by **Robert Nelson Anderson** • of the District of Columbia Bar

▪ The organization of the International Bar Association in 1947 was the culmination of over a decade of work and planning in which the American Bar Association played a leading part. Mr. Anderson's article tells the story of the founding and growth of this young organization.

▪ The American Bar Association may well take pride in the development and progress of the three-year-old International Bar Association for it was under the auspices of our Association that the new organization came into existence.

The establishment of the International Bar Association was a natural outgrowth of those forces in the world both scientific and social that each year were striking down the barriers of distance and prejudice. For at least a decade and a half prior to the inaugural meeting of the new association in New York City in February, 1947, there had been a growing interest on the part of lawyers everywhere in the development of some form of affiliation among all the national bar associations of the world. Indeed, it was high time that the legal profession turned its attention to this important problem, for it was one of the few professions that had at that date failed to develop some type of association among its national organizations.

Perhaps the slow development of an organization of the legal profession on a world-wide scale may be attributed to the fact that it was only during the generation immediately preceding 1932 that the movement for the organization of the national Bars themselves within the respective countries of the world had made any real progress. Previous to this period, only in a few nations was the legal profession then completely organized both as to personnel and geographically. From earlier times the five or more branches or groups professionally concerned with law and justice—advocates (barristers), attorneys (solicitors), judges, professors, notaries and prosecutors—found themselves developed separately. Moreover, even the advocates, who were among the first to organize, did not form originally, as now in England, a single national Bar; they were grouped in local geographic units such as cities and provinces with the Bar of the capital city as the dominant one. During the generation preceding 1932, this aloofness was being overcome and by that year the movement for national organization had spread so that there were approximately forty-three national bar associations in as many nations of the world. There was then a tendency, though slow, to bring together into one body the advocates, the attorneys and other branches. Today, with the possible exception of those countries behind the iron curtain, it is safe to say that practically every nation of the world has its national bar association.

In August of 1932 representatives of the American Bar Association attended an International Congress on Comparative Law at The Hague, Netherlands. In the succeeding October, our Association, meeting at Washington, D. C., adopted this recommendation of its Executive Committee: "As a result of the report of the American Bar Association to the International Congress of Comparative Law at The Hague, your committee recommends the appointment of a special committee to consider the question of international Bar relations." The special committee was appointed and the late Dean John H. Wigmore was named its chairman.[1]

Wigmore Committee Studies Problem

A survey[2] made by Dean Wigmore's special committee, which was predicated upon a questionnaire sent to fifty-five countries, revealed that in the year 1934 there existed throughout the world four professional

1. 57 *A.B.A. Rep.* (1932) pages 37, 356.
2. 58 *A.B.A. Rep.* (1933) pages 191, 472; 59 *A.B.A. Rep.* (1934) pages 216, 620.

bodies or legal groups having the designation "International" in their names.[3] Three of these were based on individual membership; one of them was based on delegations from organized Bars. Only two of these professional bodies listed by Dean Wigmore's committee need any particular mention.[4]

The first is the "International Law Association", which was formed in 1873. In 1934 it had an individual membership of some 2,500 located in some twenty-five countries. It meets annually in different capital cities and publishes annual volumes of its proceedings. Its meetings concern themselves mainly with programs of specific topics of substantive law. It has had a meritorious record. The Forty-third Conference of the International Law Association was held at the University of Brussels, Belgium, August 29 to September 4, 1948.

The other organization listed by Dean Wigmore's committee that should be mentioned is the "International Union of Advocates" (*Union Internationale des Avocats*), which was founded in 1928, adopted its constitution in 1929 and received a charter from the King of Belgium on January 20, 1930, under the Belgian law of October 25, 1919, pertaining to international associations. In 1934 its corporate domicile was Brussels. The Union was the only one of the four professional bodies listed by Dean Wigmore that was organized on a representative basis, i.e., membership of organized Bars that send delegates to annual meetings.[5] Its delegates met annually in different countries and published its annual proceedings. In 1934 its membership represented the Bars of fifteen nations and unofficial observers from three or four other Bars including the English General Council of the Bar and the American Bar Association.

Committee Recommends Affiliation of Bars

In submitting its final report[6] to the American Bar Association in 1934, Dean Wigmore's special committee concluded that the time was ripe for some sort of affiliation among the organized Bars of all nations and that the most suitable nucleus for such an affiliation then in existence was the Union Internationale des Avocats. The committee thereupon recommended that a special committee of five or more be appointed by the President of the American Bar Association to meet at some suitable time and place with the Executive Committee of the Union Internationale des Avocats to confer as to the possibility of affiliation with the Union. This recommendation was adopted[7] at the Annual Meeting of the Association on August 31, 1934, and a committee was appointed.

By report dated July, 1936,[8] this committee agreed with the conclusion expressed by the Special Committee on International Bar Relations that at that time the Union Internationale des Avocats presented the most suitable nucleus for an affiliation among the organized Bars of all nations, and thereupon recommended to the American Bar Association that the matter of affiliation with the Union be duly approved, subject to termination of the relationship at will. This recommendation was adopted by the House of Delegates of the American Bar Association at a session held August 28, 1936.[9]

On September 8, 1938, the Union Internationale des Avocats held its ninth[10] and what was destined to be its last Congress or annual meeting for a period of ten years,[11] at Budapest, Hungary. Fifteen of its national bar members, including the American Bar Association, were represented by official delegates. The remaining member Bars, six in number, sent excuses. The German Bar sent two observers, and the English Bar, which had regularly sent observers, was prevented from doing so by unforeseen circumstances.

The Congress of the Union for 1939[12] was to have been held in Warsaw on September 12 of that year, but war descended on Poland a short time before and the meeting never materialized. The President of the Union, one of the most prominent jurists of Warsaw, is supposed to have disappeared, and it is feared he was killed in the bombardment of that city.

War Prevents Formation of Organization

From 1939 to June 1, 1944, the war

3. To this list should now be added the Women Lawyers International Association whose European Division met at The Hague, Netherlands, August 14-15, 1948; the International Fiscal Association which met in Rome, Italy, October 3-6, 1948; the Association Internationale de Droit Pénal which became an associate member of the International Bar Association on October 20, 1947; and the International Association of Democratic Lawyers (Société des Juristes Democrats), which met in the Pravnicka Faculta, Prague, Czechoslovakia, on September 6, 1948. It has been reported that there were three American delegates of the National Lawyers' Guild and a number of lawyers of countries behind the iron curtain in attendance at the Prague meeting.

Also in this connection should be mentioned other international groups: The Inter-American Bar Association, a federation of the member bar associations of approximately nineteen of the twenty-two American countries, whose constitution was signed May 16, 1940, at the close of the Eighth American Scientific Congress at Washington, D.C., and whose Sixth Conference was held in Detroit, Michigan, in May of 1949. The Institute of International Law, founded in 1873 and composed of a limited and carefully selected membership of individuals, which met in Neufchâtel in 1947; the United Nations League of Lawyers which was organized on March 30, 1946, and whose membership is also on an individual basis.

4. The other two professional groups listed by Dean Wigmore's committee are (1) the "International Lawyers Occupational Society" (International Anwaltliche Arbeitsgenossenschaft) which in 1934 had its headquarters in Vienna and was based on individual memberships derived from some eighteen European countries, mostly from Austria and Germany and (2) the International Bar Association which was organized about 1924 on the west coast of the Pacific Ocean to bring together the lawyers of China, Japan and the Philippines. Oriental events occurring just previous to 1934 put an end to its usefulness in that year.

5. To the Union Internationale des Avocats there must now be added as associations organized on a representative basis the Inter-American Bar Association, the International Association of Democratic Lawyers (both referred to in footnote 3, *supra*), and the International Bar Association itself.

6. 59 *A.B.A. Rep.* (1934) 216, 620.

7. *Id.* at 217.

8. 61 *A.B.A. Rep.* (1936) 846.

9. 61 *A.B.A. Rep.* (1936) 273.

10. Proceedings of the Ninth Congress of the Union Internationale des Avocats (Document No. 15); 25 *A.B.A.J.* 433, May, 1939.

11. The Union Internationale des Avocats held its first meeting since World War II at Brussels on May 8-9, 1948.

12. Commendable as the activity of the Union Internationale des Avocats was, nevertheless, it lacked a truly world aspect; in fact, its scope was somewhat localized since its constituent bodies were principally European. Many outstanding Bars of the world, including the English, were not represented officially in its councils.

cast its long shadow over the minds and hearts of men everywhere, and lawyers, while still clinging to the desire to affiliate with their fellow lawyers throughout the world, were content to let the problem rest in *statu quo*. On the latter date, however, the subject was again taken up and discussed at a meeting of the Council of the Section of International and Comparative Law of the American Bar Association. During the course of that meeting, pursuant to a motion made by William Roy Vallance of Washington, D. C., Mitchell B. Carroll of New York, the Chairman of the Section, appointed a special committee to investigate and report on the desirability and feasibility of the formation of an International Bar Association.[13]

The first report of the special committee, known as the Committee on the Organization of an International Bar Association,[14] was filed September 12, 1944, and was approved unanimously by the Section of International and Comparative Law on the same date. In regard to the desirability of the formation of an International Bar Association, the Committee said:

> The desirability of the formation of a truly international and representative bar association is more evident now than it was when the American Bar Association voted affiliation with the present non-operating Union Internationale des Avocats, on August 28, 1936. The question does not appear to be open to debate. With the world plunged into a cataclysmatic death struggle, any effort that will tend to maintain peace where chaos now exists, and which will assist in furthering the rule of law as opposed to force, cannot be lightly cast aside.
>
> All other professions, in fact almost all other occupations, have found it desirable and to mutual advantage to develop either through associations, congresses or committees some sort of affiliation between the national organizations in their own field throughout the world. *A fortiori* lawyers possessing the strongest bonds of sentiment, public duty, and common experience in human nature would find it of common benefit to establish and maintain a forum which would permit the free discussion of problems of vital significance to the profession in general.
>
> More and more the lawyer must assume the leadership that naturally falls upon him. It is he, with his specialized knowledge of the development of laws and of government, who must assist in solving the great problems arising out of post-war readjustments. He must lend his support to the establishment and continuance of an effective international peace among all nations, based on law and the orderly administration of justice. He must encourage the inauguration and maintenance of a judicial system of inter-related permanent inter-national courts, with obligatory jurisdiction, so as to insure the administration of international justice. An active virile International Bar Association would be of great assistance in the furtherance of these things.

The committee was also of the opinion that the formation of an International Bar Association was as feasible at the date of its report, if not more so, as when affiliation was voted with the then existing Union Internationale des Avocats back in 1936. The world had grown smaller apace as a result of stupendous improvements in the means of transportation and communication. The effective operation and outstanding achievements of the Inter-American Bar Association, even in total war, bore convincing testimony as to the practicality of national Bars' affiliating one with another in a world-wide association. While the difference between legal systems of English-speaking countries and those of others is of a fundamental nature, there are many pressing and important questions that are of vital and common interest to a world of lawyers.

Invitation to Meeting Is Extended

Having succeeded in agreeing upon a tentative draft of a proposed form of organization or constitution of an International Bar Association,[15] the committee in the spring of 1946 forwarded to the head of the national or capital city Bar of each country of the world in which one existed a copy of such draft together with a copy of the resolutions passed at the meeting of the House of Delegates held in Cincinnati, Ohio, on December 23, 1945, wherein the American Bar Association approved the principle of coöperation among the units of the organized Bars of the respective nations of the world. So encouraging was the response to this communication addressed to the national or capital city Bar of each country, that, on motion of Chairman Edgar Turlington of the Section of International and Comparative Law, the House of Delegates on July 2, 1946, authorized the then President of our Association, Willis Smith, to invite the national units of the organized Bar with whom the committee had been in contact to send representatives to a meeting in New York City for the purpose of considering and agreeing upon a constitution for an International Bar Association.[16]

The result of the invitations, which were forwarded by President Smith in September, 1946, was that on October 8 and 9 of that year representatives of the national bar associations of twenty-one countries on five continents met at the House of the Association of the Bar of the City of New York. Endorsement of the proposal for the organization of an International Bar Association by national bar organizations in ten other countries, unable to have representatives present, was recorded. The representatives present, after discussions that occupied two days, revised and then accepted in principle the revised draft of a proposed constitution prepared by a drafting committee consisting of Henry F. Butler, George Maurice Morris, Edgar Turlington, William Roy Vallance and the writer, all of Washington, D. C. These representatives also appointed a "Committee for Organization of the International Bar

13. This committee consisted of Frederic R. Coudert, Sr., New York; John W. Davis, New York; Judge Joseph C. Hutcheson, Jr., Houston, Texas; Justice Frederic M. Miller, Des Moines, Iowa; George Maurice Morris, Washington, D. C.; Judge Orie L. Phillips, Denver, Colorado; Dean Roscoe Pound, Cambridge, Massachusetts; Arthur T. Vanderbilt, Newark, New Jersey; and, the writer, of Washington, D. C., Chairman.

14. 69 A.B.A. Rep. (1944) 169.

15. Proceedings of the Section of International and Comparative Law at the Cincinnati, Ohio, meeting December, 1945, page 134.

16. 32 A.B.A.J. 488; August, 1946.

Association".[17] The Committee was directed to send invitations to the organized lawyers throughout the world to attend in the near future a meeting to inaugurate the International Bar Association.

Inaugural Meeting Set for February, 1947

The Committee for Organization of the International Bar Association fixed the date of the inaugural meeting as February 17-18, 1947, and the place as the House of the Association of the Bar of the City of New York. Transmitted with the invitation referred to in the preceding paragraph was a copy of the proposed constitution. The national bar organizations invited were advised that those accepting the invitation would be considered charter members of the organization.

At the appointed date and place the dreams of forward-looking and pioneering members of the American Bar Association for a decade and a half were finally realized and the International Bar Association became a reality. Accepting the invitation of the Committee for Organization and thus becoming charter members were the following twenty-three national bar associations:[18] Academia de Abogados de Quito; American Bar Association; Asociación de Abogados de Guatemala; Bar Association of Czechoslovakia; Bar Association of Siam; Colegio de Abogados del Distrito Federal (Carácas); Colegio de Abogados de la Habaña; Colegio de Abogados de España; Colegio de Abogados de Lima; Colegio de Abogados del Uruguay; Damascus Bar Association; Faculty of Advocates (Scotland); Federación Argentina de Colegios de Abogados; General Council of the Bar (England); Instituto da Ordem dos Advogados Brasileiros; Iranian Bar Association; Iraq Bar Association; Law Society (England); Law Society of Newfoundland; Ordre des Avocats de Lebanon; Philippine Bar Association; Sociedad de Abogados de la Honduras; Vienna Bar Association, Lower Austria and Burgenland.

The purposes of the International Bar Association, as stated in its constitution, are to advance the science of jurisprudence in all its phases and particularly in regard to international and comparative law; to promote uniformity in appropriate fields of law; to promote the administration of justice under law among the peoples of the world; to promote in their legal aspects the principles and aims of the United Nations; to establish and maintain friendly relations among the members of the legal profession throughout the world; and to coöperate with and promote coördination among international juridical organizations having similar purposes.

The constitution also states that the association is a nonpolitical organization.[19] Membership is open to any national organization of members of the legal profession as defined and includes organizations of "attorneys, counselors, solicitors, barristers, advocates, judges, professors of law, *et cetera*". Individual members of the legal profession may be elected patrons of the Association and are entitled to attend the International Conferences of the Legal Profession and sessions of the House of Deputies and to participate in the symposiums of such conferences. Agreements for coöperation with other international organizations having similar purposes may be entered into by the Association's Executive Council.

Offices of Association Are in New York City

The principal offices shall be at or near the seat of the United Nations (actually 501 Fifth Avenue, New York City), and the International Conferences of the Legal Profession shall be at times and places to be fixed by the House of Deputies. The officers include a President, a Vice President for each country represented in the Association by a national organization, a Speaker of the House of Deputies, a Secretary General, and a Treasurer.[20]

Now in existence just a little over three years, the International Bar Association has attained a growth and influence far beyond the expectations of its sponsors. Well over one hundred thousand lawyers from every continent are now represented in the Association. Membership includes forty-one of the leading national organizations of the legal profession from thirty-five countries. There is one associate member and there are approximately three hundred and fifty individual patrons.

A meeting of the First Conference

Robert Nelson Anderson was named Chairman of the Committee for Organization of an International Bar Association at a meeting of representatives of the world's national bar associations in New York in October, 1946. Admitted to the Virginia Bar in 1922 and to the Bar of the District of Columbia in 1923, he has had experience both in private practice and as a government attorney. He has been Special Assistant to the Attorney General since 1934. A past president of the Federal Bar Association, he was the representative of that association in the House of Delegates of the American Bar Association in 1944-1945.

17. The names of the members of this Committee are listed in 33 A.B.A.J. 125; February, 1947, as follows: Chairman Robert N. Anderson, U.S.A.; Alfred Body, Australia; Otto Zucker, Austria; Ramiro S. Guerreiro, Brazil; C. J. Burchell, Canada; Luis Anderson Marua, Costa Rica; Paul J. Edwards, Czechoslovakia; Carlos Sanchez y Sanchez, Dominican Republic; Eduardo Salazar, Ecuador; André Prudhomme, France; Maurice E. Bathurst, Great Britain; Octavio Aguilar, Guatemala; Taghi Nassr, Iran; Edward V. Saher, Netherlands; Olaf Tellefsen, Norway; Alberto Ulloa, Peru; David Avram, Rumania; Konthi Suphamongkhon, Siam; Bernardo Rolland, Spain; Gustavo Herrera, Venezuela. Secretaries: For North and South America, Amos J. Peaslee, U.S.A.; for Europe, Africa, Australia and New Zealand, Robert Tenger; for Asia, Konthi Suphamongkhon.

18. At the Atlantic City meeting of the American Bar Association on October 29—November 1, 1946, the House of Delegates voted that our Association accept membership in the International Bar Association. 33 A.B.A.J. 187.

19. Contrast this with the polemic aims of the International Association of Democratic Lawyers (footnote 3, *supra*) as set forth in a resolution adopted at its organizational meeting in Paris, October 24-27, 1946. See 33 A.B.A.J. 125; February, 1947.

20. Members of the American Bar Association now serving as officers of the International Bar Association are George Maurice Morris, Speaker, House of Deputies; Harold J. Gallagher, Vice President; Amos J. Peaslee, Secretary General; and Gerald J. McMahon, Assistant Secretary General.

of the Legal Profession, under the sponsorship of the International Bar Association, was held in New York City, October 19-22, 1947, attended by deputies from twenty-three national bar associations, and by fifty-two patrons that were not accredited as deputies. The working sessions were conducted by seven symposium groups which made various recommendations. At the plenary sessions, addresses were given by many prominent lawyers and jurists, including Tappan Gregory, then President of the American Bar Association; Ivan Kerno, Assistant Secretary General of the United Nations; Dr. Yuen Li Liang, Director of the Division of Development and Codification of International Law of the United Nations Secretariat; W. E. Beckett, K. C., Legal Adviser to the British Foreign Office; Judge H. I. Lloyd, Legal Adviser to the Delegation of Iraq to the United Nations, Lic. Miguel Macedo of Mexico and Dr. Edward V. Saher of the Netherlands. The banquet at the Hotel Plaza was an outstanding event, with addresses by Dr. Oswaldo Arañha, President of the General Assembly of the United Nations; Sir Hartley Shawcross, Attorney General of England, and the Honorable Tom C. Clark, then Attorney General of the United States. Robert E. Lee, President of the New York State Bar Association, greeted the conferees at a reception given by that organization.

From August 15 to 21, 1948, lawyers numbering approximately five hundred and thirty from fifty-five nations gathered, either as official delegates of their respective bar associations or as patrons or invited guests, at the Peace Palace, The Hague, Netherlands, for the Second Conference of the Legal Profession under the sponsorship of the International Bar Association. As evidence of the interest of the American Bar in the new Association, approximately sixty-five of these were from the United States. The hosts to the gathering were the Netherlands Government, the Netherlands Bar Association, and the municipalities of The Hague and Amsterdam. It would be difficult to imagine a more successful conference. Seventeen symposium groups conducted the working sessions and covered a wide range of vital legal problems. Practically all these made recommendations for future activity in their particular field. The two plenary sessions were devoted to a discussion of the matter of "Restoration of the Law and Property Rights after World War II" and "An International Code of Ethics for Lawyers". Outstanding authorities in the various fields of the law and leaders in world thought and action spoke and participated in the various functions of the conference. Great credit is due to the Chairman of the Program Committee, Dr. Edward V. Saher of the Netherlands Bar Association, the members of his committee, and the officers of the Association, for the success of the meeting.

The Executive Council of the International Bar Association is formulating plans for the Third International Conference of the Legal Profession, which will be held this summer at London, England, July 19 to 26. Invitations were also received from the national bar associations of France, Spain and Lebanon to hold the conference in those countries. There is reason to believe that this conference will be even more important and accomplish greater results than its predecessors, and that the International Bar Association will continue to grow in membership and influence. Lawyers throughout the world and particularly in America realize that "justice under law" is the essential ingredient for peace as well as order in the world, and their increasing awareness of the potentialities of the organized Bar has attracted their attention to international organizations concerned with the law of nations and to international organizations of members of the legal profession.[21]

21. 33 A.B.A.J. 122; February, 1947.

NOTICE OF ANNUAL MEETING OF MEMBERS AMERICAN BAR ASSOCIATION ENDOWMENT

■ The annual meeting of members of American Bar Association Endowment will be held during the week of the Annual Meeting of the American Bar Association, September 18-22, 1950, at Constitution Hall, Washington, D. C., for the following purposes:

(1) Acting upon a proposed amendment to the By-Laws, whereby in lieu of existing Article VI the following would be substituted:

The books of account shall be audited annually by Certified Public Accountants and shall at reasonable times be open to inspection by any member of the corporation.

(2) Transacting such other business as may come before the meeting.

All members of the American Bar Association are members of the Endowment.

Wormser on the Law:

Some Thoughts on Legal Histories

by Ben W. Palmer • of the Minnesota Bar (Minneapolis)

■ René A. Wormser's new book, *The Law*, is an ambitious effort to explain American law to laymen. The editors of the *Journal* assigned the book to Mr. Palmer for review. He responded with this essay on legal history, in which he takes issue with some of Mr. Wormser's conclusions and discusses the problems of the legal historian and the reviewer that seeks to criticize the historian's difficult task.

■ A book review may be a pretext, based upon a preface, a pole-axe, a collection of pin pricks, or like an ecstatic publisher's blurb.

It may be a pretext, the book under review merely the peg upon which the reviewer may display his own opinions. So Macaulay in the *Edinburgh Review* after three and a half pages on one of Milton's recently discovered works gave us sixty-one pages of Macaulay on Milton. After one short paragraphic review of two volumes on the Earl of Chatham, Macaulay entertains us with fifty-five pages of his own ideas about Pitt. And his fifty-six page essay on history does not even mention the book under review or name its author. This information is relegated to a footnote.

The prefatory book review shows such ignorance of the text that plainly the reviewer never got beyond the preface. This would be all right if he did not seek to convey the impression of a complete and careful survey of the whole book. He might be justified in saying that the preface was enough on the familiar principle that one need not eat all of an egg to know that it is bad; but of course a pretended reading in full is fraud. The pole-axe review is the swift decapitation of the author by abusive epithet with an assumed air of omniscience and omnicompetence. The pin prick review is also designed to show the superiority of critic over author, as for example: "On page 271 the author says that Lord Coke was married on Thursday. In fact it was on Friday. The quotation from *Rex* v. *Giblets* instead of reading 2 B. & E. 421, 425 should be 2 B. & E. 421, 424. On page 301 it is said that Coke rode in the Lord Mayor's procession with Sir Randolph Crew. This is an error. As the author would have known had he taken the trouble to read Lady Hatton's Diary, Coke was in Sir Francis Knolly's coach. And furthermore he was wearing a stuff gown and not a silk one. Silk gowns did not come in until three years later. Moreover, the author is wrong in saying that on the morning of his release from the Tower Coke ate ham and eggs. The word between 'ham' and 'eggs' in the original Latin is not 'et' but 'vel' and 'vel' then meant, not 'and', as any competent philologist knows—or even one having but scant knowledge of English history—but 'or'. So it was 'ham *or* eggs' and not 'ham *and* eggs', as the author would lead us to believe."

And finally, all of us have hurried to buy a book hailed by some ecstatic reviewer in roseate-contented rather than ugly-poleaxe mood as the book of the century, only to find it drivel.

Review Should Ordinarily Be Short

It is as elementary as anything that Holmes ever said to Dr. Watson that the reviewer should ordinarily limit himself to short answers to such questions as: What is this book about? Who wrote it? What was his competency? What was his purpose? Was his purpose worth while? Did he achieve it? Is the book accurate? Is it interesting? What about its style? How does it compare with other available works on the same subject, if any?

And so we come to Wormser on *The Law*.[1]

This book is about the laws of Moses, the ancient Greeks, the Romans, German barbarians and makers of feudal law, churchmen and the canon law, Bartolus, leaders of

1. THE LAW. By René A. Wormser. New York: Simon and Schuster. 1949. $5.00. Pages 583.

the Reformation, Napoleon, the common and American and international law. Its purpose is to give laymen "some idea of how the law which governs us today came into being; how it had its beginning in ancient civilizations, how it developed, what great personalities helped give it shape and substance, and some of its major past and present problems". The author of this book received his B.S. and LL.B. degrees from Columbia, was admitted to practice in 1920 and is practicing law in New York City.

This reviewer so detests the captious, pin-pricking reviewer, is so anxious to avoid injustice to one who has attempted a most difficult task, that it is with hesitation and only in the interest of truth that attention is called to what this reviewer regards as certain errors in the text.

At the outset of his book the author says:[2] "Nobody knows what the term 'law' means, anyway. That may seem an astounding statement, but the fact is that thousands of definitions of that term have been offered and not one has been found wholly satisfactory." If "nobody knows what the term 'law' means", an unkind critic might well ask how anybody could write a book about it. The author has evidently fallen into an error common to many of those who have been influenced by the pretended new discoveries of the "semanticists" and by relativism. We are quite sure that the author would defend to the death his "liberty" against a foreign invader even though there are many varying meanings of that word.

Augustus Caesar and the Jurists

Mr. Wormser says[3] that the purpose of Augustus in licensing selected jurists was to avoid conflicting opinions and end an uncertainty in the law that was "distasteful to him". But Schulz says that the emperor's purpose "in line with his own scheme of government" was to provide "facilities for the princeps inconspicuously and under republican forms, to influence the rulings of the jurisconsults".[4] Sohm[5] says it was "with a view to restoring the authority of professional legal opinions, and at the same time, very probably, to throwing the imperial power into fresh relief. . . . Henceforward the pontifical college ceased to play any part in the shaping of the civil law, and the princeps in conjunction with scientific jurisprudence . . . assumed, to an ever increasing extent, the lead in the further development of the law".

"Soon after the discovery of America by Columbus" says Mr. Wormser[6] "Pope Alexander VI issued his bull Inter Caetera in which he presumed to divide the Western Hemisphere between Spain and Portugal." The word "presumed" is obviously a "loaded" word. It ignores the factor of arbitration between two powers on the verge of war, and such historians as Winsor, who says that the Pope was appealed to,[7] and Bourne[8] who wrote that the bull "did not divide the world between Spain and Portugal, but rather marked out regions in which the right of discovery would give unquestioned and final title".

Mr. Wormser overemphasizes the influence of Voltaire and Rousseau on American pre-Revolutionary thought.[9] He says that "Voltaire's work had much to do with preparing our educated classes for revolt and for their determination to establish a secure and progressive government". And he goes so far as to say that "It was from Rousseau that our Declaration of Independence took the principle that 'all men are created equal' ". This came from Locke;[10] and Carl Becker, the recognized authority on the Declaration says:[11] "It has sometimes been assumed that Jefferson and his American contemporaries must have borrowed their ideas from French works, must have been 'influenced' by them, for example by Rousseau. But it does not appear that Jefferson, or any American read many French books. So far as the 'Fathers' were, before 1776, directly influenced by particular writers, the writers were English and notably Locke. . . . If Jefferson had read Rousseau's Social Contract we may be sure that he would have been strongly impressed by it." As Catlin says,[12] "It is a popular error to suppose any debt to exist upon the part of the authors of the American Revolution to Rousseau or the Encyclopædists. The debt is all the other way."

It is true that[13] "socialism and even Marxism have pointed up many social injustices". But to go on and say "It has given us the belief that labor is not merely entitled to what it can command as a commodity subject to the simple law of supply and demand but should have a 'fair' return for its work" is to ignore the non-Marxist and nonsocialist liberal, Christian and humanitarian demand for social justice. Much of that was a revival of the medieval concept of

2. Page 4.
3. Page 119.
4. Schulz, *History of Roman Legal Science* (Oxford 1946) 112-113.
5. Sohm, *The Institutes* (3d ed. Oxford 1926) 92-93.
6. Page 186.
7. 2 Winsor, *Narrative and Critical History of America* (1886) 113.
8. Bourne, *Spain in America* (Vol. 3 of American Nation Series—New York 1904) 31.
9. Pages 220-224.
10. 2 Locke, *Two Treatises on Government* (Everyman's 1924) 118-119, 142.
11. Becker, *The Declaration of Independence* (N. Y. 1942) 27. He does not mention any influence by Voltaire. On Locke, see Matt, *Due Process of Law* (Indianapolis 1926) *passim.*; Maxey, *Political Philosophies* (N. Y. 1938) 411; Sabine, *A History of Political Theory* (N. Y. 1937) 539; Cook, *History of Political Philosophy* (N. Y. 1936) 545.
12. Catlin, *The Story of the Political Philosophers* (N. Y. 1939) 318. Voltaire and Rousseau were available in America before 1776 (Greene, The Revolutionary Generation (N. Y. 1943) 137, but on lack of influence, see Adams, *Revolutionary New England* (Boston 1923) 288; Schneider, *A History of American Philosophy* (N. Y. 1946) 47; Cook, *op. cit. supra* note 10 at 643; Walsh, *The Political Science of John Adams* (N. Y. 1915) 210. That Voltaire was not a democrat, see Cook, *op. cit. supra* at 665; that neither Voltaire nor Rousseau were revolutionaries see Alfred Cobban, *Rousseau and the Modern State* (London 1934) 57. My search of the writings of Jefferson and John Adams shows no influence of either Voltaire or Rousseau. John Adams thought Voltaire "a little cracked"; that he and Rousseau have shown "themselves as incapable of governing mankind as the Bourbons or the Guelphs"; that they were totally destitute of common sense. See Koch and Peden, *The Selected Writings of John and John Quincy Adams* (N. Y. 1946) 188, 191, 194. Though John Adams in 1817 had a word of compliment for Voltaire (10 *Works* (Boston 1856) 257), in 1816 he spoke of him and Diderot as "restless, vain, extravagant animals" (Id. at 213).
13. Page 233.

the just wage.[14]

Americans Esteemed Blackstone's Commentaries

American veneration for Blackstone is said[15] to be "strange in view of his bitter opposition to the American cause". This overlooks the indispensable value of the *Commentaries* to the practicing lawyer and student, the fact that many of Blackstone's Tory utterances outside of the *Commentaries* were generally unknown at the time in America. Most of all it overlooks the great use made of Blackstone by the colonists in the polemical struggle that preceded the appeal to arms.[16] And while it is true that Blackstone said[17] that to deny the existence of witchcraft was to contradict the revealed word of God, it should be added that Blackstone also said[18] "all executions for this dubious crime are now at an end; our legislature having at length followed the wise example of Louis XIV of France, who thought proper by an edict to restrain the tribunals of justice from receiving informations of witchcraft".

It is true that when a jury in 1735 acquitted John Peter Zenger in New York on a trial for criminal libel of the Governor, a precedent was established for freedom of the press. The Court had charged the jury in the face of argument to the contrary by Andrew Hamilton of Philadelphia that truth was no defense.[19] But when Mr. Wormser says that "Thereafter, it has been a defense to an allegation of libel that the statements complained of are the truth", we think he is in error. We doubt whether the general verdict of the jury would create a precedent for appellate courts. In a circuit court in New York in 1804 a judge charging a jury in a criminal libel case said that the truth of the publication ought to be considered merely as an item to show the intent, for there might be cases in which the truth of a libel would be no justification.[20] The theory was as to criminal libel that it has "a tendency to a breach of the peace, by provoking the person libelled to break it; which offense is the same (in point of law) whether the matter contained be true or false".[21] In *People* v. *Creswell*[22] in 1804 the New York Supreme Court was divided two against two as to whether truth was admissible as a defense in criminal libel. In none of these opinions is there any mention of the *Zenger* case. When the change came it was by statute, as in Massachusetts in 1827, with good motives and for justifiable ends, or by constitutional provisions, and in England by Lord Campbell's similar act in 1843.[23]

Passing from Zenger's free press to Patrick Henry's familiar Stamp Act reference to Caesar and Brutus, Mr. Wormser says the speaker uttered his famous words "If this be treason, make the most of it".[24] Here he is following a tradition that started from John Tyler's recollection of what he heard when eighteen years old while standing in the lobby of the Virginia House of Burgesses.[25] But unfortunately there is no text preserved of a single one of Henry's speeches.[26] And in 1921 there was discovered in the Paris archives of the Service Hydrographique de la Marine the journal of a French traveler that noted[27] that in the Virginia House of Burgesses on May 30, 1765: "One of the members stood up and said he had read that in former times tarquin and Julus had their Brutus, Charles had his Cromwell, and he Did not Doubt but some good American would stand up, in favour of his Country, but (says he) in a more moderate manner, and was going to continue, when the speaker of the house rose and Said, he, the last that stood up had spoke traison, and was sorey to see that not one of the members of the house was loyal Enough to stop him before he spoke so far. Upon which the Same member stood up again (his name is henery) and said that if he had affronted the speaker, or the house, he was ready to ask pardon, and he would shew his loyalty to his majesty, King G. the Third, at the Expense of the last drop of his blood . . . some Members stood up and backed him, on which the afaire was droped."

When we pass from the Revolution to the adoption of the Constitution Mr. Wormser says that[28] "It is an astounding fact that our Constitution was actually imposed upon a people against their desire." It is true that James Truslow Adams[29]

14. This is inferentially to ignore the whole sweep of non-Marxian, nonsocialistic labor movement, typified in leadership by such a man as Samuel Gompers; economists such as John R. Commons and Richard T. Ely; church leaders such as Washington Gladden, Josiah Strong, Francis G. Peabody, Walter Rauschenbusch and Msgr. John Ryan, to name but a few; the formulation of Social Ideals of the Churches by the General Conference of the Methodist Episcopal Church (North) and by the Federal Council of Churches in 1908 and subsequent formulations; Pope Leo XIII's encyclical of 1891, *On the Condition of Labor*; the Catholic Bishop's Program for Social Reconstruction of 1919; the Social Justice Program of the Central Conference of American Rabbis of 1920; Pope Pius XI's encyclical, *On Reconstructing the Social Order* in 1931. See as illustrative, Crump and Jacob, *The Legacy of the Middle Ages* (Oxford 1948) 355; Husslein, *The Christian Social Manifesto* (N. Y. 1931); 8 *Encyc. Soc. Sci.* (N. Y. 1932) 505-507; Ryan, *Distributive Justice* (N.Y. 1927); Bogardus, *A History of Social Thought* (Los Angeles 1922); Peabody, *Jesus Christ and the Social Question* (N. Y. 1900); Ferm, *An Encyclopedia of Religion* (N. Y. 1945) 718; St. Thomas Aquinas, *Summa Theologica*, ii, 1513 (Benziger ed. 1947); Faulkner, *The Quest for Social Justice* (N. Y. 1931); "The Moral History of U. S. Business", *Fortune* 144-149, 155-160 (December, 1949); Jarrett, *Social Theories of the Middle Ages* (Westminster, Md., 1942).

15. Page 304.

16. See, e.g., Wright, *American Interpretations of Natural Law* (Cambridge 1931) 11; Gettell, *History of American Political Thought* (N. Y. 1928) 74; Merriam, *A History of American Political Theories* (London 1920) 48; Lockmiller, *Sir William Blackstone* (Chapel Hill 1938) 173, 266; Warden, *The Life of Blackstone* (Charlottesville 1938) 320 *et seq.*

17. Wormser, page 306. 4 *Wendell's Edition of Blackstone's Commentaries* (1854) 59.

18. Id. 60.

19. Wormser, pages 327-328; Rutherfurd, *John Peter Zenger* (N. Y. 1904); Greene, *Provincial America* (N. Y. 1905) 203; 2 Hart, *American History Told by Contemporaries* (N. Y. 1902) 192-199. He gives the year as 1734 as does Dean Pound in "A Survey of Public Interests", 58 *Harv. L. Rev.* 909, 914 (1945).

20. *People* v. *Tracy*, 2 Wheeler Criminal Cases 358.

21. Wendell's Edition of Blackstone, *supra* note 17 at 125. See also, 33 *Am. Juris.* 299.

22. 2 Wheeler's Criminal Cases 330. Kent and Thomson were for its admission; Livingston and Lewis against. The case was "argued at the bar with great ability", 2 Kent's Comm. (6th ed.) 1848) 19.

23. 2 Kent's Comm. 19-24; 33 *Am. Juris.* 299; *People* v. *Simmons and Wheaton*, 1 Wheeler Criminal Cases 351 (Recorder's Ct. N. Y. City 1823); *Barthelmey* v. *People*, 2 Hill 249 (N. Y. 1842); The New York statute was 1805, 9 *Encyc. Soc. Sci.* 433. See also 13 *Encyc. Brit.* (14th ed.) 998.

24. Page 333.

25. Tyler, *Patrick Henry* (Boston 1898) at note 1, page 73. For the growth of the story, see Morison, *Sources and Documents Illustrating the American Revolution* (Oxford 1923) 15.

26. 2 Hart, *op. cit. supra*. note 19 at 203.

27. 26 *Amer. Hist. Rev.* 745 (July, 1921).

28. Page 349; see also page 353.

29. *The March of Democracy* (N. Y. 1932) 164.

says that "it seems impossible to avoid the conclusion that the greater part of the people were opposed to the Constitution". But this appears to be mere conjecture. It is also true that Marshall wrote[30] "It is scarcely to be doubted that in some of the adopting states a majority of the people were in opposition". But Andrew C. McLaughlin wrote[31] "Several conclusions seem reasonably well founded: the majority of the people, even when the issue was important and had been much discussed, were apathetic. . . . The new government was set up by men who were sufficiently interested to vote. The democracy of the nineteenth century had not yet arrived". Certainly in the face of ratification, however close, those who claim that the Constitution was "imposed upon the people against their desire" have the burden of proof.

Did Jackson Let Marshall "Enforce His Decision"?

Mr. Wormser repeats the old assertion that President Jackson openly defied the Supreme Court, saying "John Marshall has made his decision; now let him enforce it".[32] Warren says[33] "It is a matter of extreme doubt, however, whether Jackson ever uttered these words. He certainly did not, in fact, refuse to aid in enforcing the Court's decision; and the charge so frequently made in modern histories and legal articles that Jackson actually defied the Court's decree is clearly untrue".

When we come to Lincoln we think there are two errors. At least we know of no convincing proof of the statement[34] that in 1863 the membership of the Supreme Court "was increased to ten, in order to give Lincoln a chance to create a sympathetic majority".[35] "Lincoln" says Mr. Wormser[36] "was horrified at the Dred Scott decision but went only as far as to suggest that the Supreme Court might do with a change in personnel." His attitude was most clearly expressed in his Springfield speech June 26, 1857:[37] "But we think the Dred Scott decision is erroneous. We know that the Court that made it has often overruled its own decisions, and we shall do what we can to have it overruled."[38]

Having called attention to some of the inaccuracies that we caught in once reading this book, we now hasten to add a general note of praise. Mr. Wormser is to be congratulated for his courage in attempting a gigantic task and one that greatly needs doing if the Bench and Bar are to have the sympathetic lay understanding they need for success in their endeavors. No doubt Mr. Wormser knew the perils of his task. On the whole he has admirably achieved his purpose. For the book is clear, terms when first used are defined or explained, the general balance is excellent, the style is engaging, and above all the book is interesting. Even the well-read lawyer will find this summary stimulating, informative and an excellent addition to his library.[39]

30. Quoted in Beard, *An Economic Interpretation of the Constitution of the United States* (N. Y., 1914) 299.

31. *A Constitutional History of the United States* (Student's ed. N. Y. 1935) 221.

32. Page 382.

33. 2 Warren, *The Supreme Court in United States History* (Boston 1923) 210. The decision that was referred to was made in 1832. The first appearance of the alleged remark was in Greeley's *American Conflict*, published in 1864. Greeley said he got the story from one who was in Washington when the decision was made.

34. Page 38.

35. For the situation, see 3 Warren 102, and from a hostile point of view, see Myers, *History of the Supreme Court of the United States* (Chicago 1912) *circa* 497. I do not find that even he makes the charge.

36. Page 411.

37. 2 Nicolay and Hay, *Works of Lincoln* (N. Y. 1905) 321. To same effect in Chicago, 3 *id.* 39; at Quincy, 4 *id.* 330; at Alton, 5 *id.* 68.

38. We find no reference to "change in personnel" in Beveridge, Herndon, Morse, Swisher, Tarbell, Sandburg, Nicolay, Hay or Angle. Douglas did say: "Mr. Lincoln intimates that there is another mode by which he can reverse the decision. How is that? Why he is going to appeal to the people to elect a president who will appoint judges who will reverse the Dred Scott decision. . . . What man would feel that his liberties were safe, his right of person or property secure, if the Supreme Bench . . . was brought down to that low, dirty pool wherein the judges are to give pledges in advance how they will decide all the questions which may be brought before them? It is a proposition to make that court the corrupt, unscrupulous tool of a political party." Quoted in 1 Barton, *Life of Abraham Lincoln* (Indianapolis 1925) 383-340. For a summary of Lincoln on Dred Scott, see also Palmer, *Marshall and Taney* (Minneapolis 1939) 210-214. As to the proposed appointment of Chase and Lincoln's question, "and a little sharply", "Would you have me pack the Supreme Court?", see 3 Sandburg, *Abraham Lincoln: The War Years* (N. Y. 1939) 593, and at page 599: "We cannot ask a candidate what he would do; and if we did and he should answer, we should only despise him for it."

39. In this reviewer's opinion, Wormser is definitely superior to William Seagle's *The History of Law* (N. Y. 1941) and to John M. Zane's *The Story of Law* (N. Y. 1928). At page 328, Wormser says "In Connecticut, as late as 1698, lawyers were classed, in one law, with drunkards and keepers of disorderly houses". We have seen this statement a number of times without citation of authority, have been unable to find it in the Code of 1650, reprinted by Andrus at Hartfort in 1825 and by Smucker at Philadelphia in 1861; in the Book of General Laws of Connecticut (Green) 1673. We suspect that the first man to make this assertion may have confused "barrator" with "barrister" or there may have been a misprint somewhere along the line.

When my Father became a Judge I said to him, "Be kind to the *young* lawyers." When I became a Judge, he said to me, "Be kind to the *old lawyers.*"

—Notes of a District Judge, Part II,
by Claude McColloch

THE PRESIDENT'S PAGE

HAROLD J. GALLAGHER

■ I am just concluding, as this page is written, a five weeks' trip across the country, fulfilling the engagements mentioned in the May issue of the JOURNAL. In addition to the engagements then referred to it was my pleasure to accept invitations to address, on April 26, the law students at Stanford University, Palo Alto, California, Santa Clara University, Santa Clara, California, and the Santa Clara County Bar Association, San Jose, California.

American Bar Association Is Interested in Law Students

It is most necessary that we, as lawyers take an interest in the law students. They are the future lawyers of the United States and the future leaders of the Bench, of the Bar and of the political life of our country. It is inspiring to see how interested these young men are in hearing about the work of the organized Bar. I have been doing all I can to promote interest in the American Law Students' Association. It has chapters in more than fifty law schools throughout the land. It provides an excellent opportunity for the law student for the right sort of introduction to the problems of the legal profession, as well as a knowledge of how the organized Bar is attempting to deal with these problems. This educational program should do much to make these young men bar association conscious and equip them to take part in the activities of the Junior Bar Conference of the American Bar Association and the various state associations upon their admission to the Bar. The future of the profession depends on these young men. By contact with members of the Bar they should learn that admission to the Bar is not a mere license to carry on a trade, but that it is an entrance into a profession with honorable traditions of service that they are bound to maintain.

Local Bar Associations Are Important

I have, also, greatly appreciated the opportunity of speaking to so many local bar associations.

I am convinced that the accomplishment of the vital objectives of the organized Bar, such as improvement of the administration of justice, continuing legal education, unauthorized practice, American citizenship, extension of legal aid societies, promotion of lawyers' reference service plans and many others must depend for their success upon the more effective activation of the local Bars. The primary purpose of the effort to coördinate the activities of the American Bar Association with state and local associations is to bring about a closer working relationship with the local lawyer. There is so much talent and influence available on the local level. All we have to do is to arouse the interest and enthusiasm of such lawyers. We must make known to them our objectives. They will, I am sure, from my experience in talking with these lawyers in the many local and state associations I have addressed, be eager to assume their individual responsibility and will gladly lend their assistance in our work.

The American Bar Association and the state bar associations can, in most matters, only point the way by supplying some leadership and material. We can achieve our greatest success only by enlisting the support of the thousands of lawyers in their local communities. The combined force of their influence and assistance, when properly directed and channeled as a public service for the common good of the public and of the profession, will be irresistible. May I urge every lawyer who reads this page to reflect deeply on this problem. Let him, in his own way, go about building up his own local bar association into a strong and virile association, dedicated primarily to the public service. Let him familiarize himself with the work of the Sections and committees of state and national associations and then determine how he can activate his own local association to carry into effect the objectives of such associations. Let him assume a personal responsibility in establishing a Legal Aid Society and a Lawyer's Reference Service Plan in his own local association. Let him further the work of our Committee on American Citizenship—that is, to teach the responsibilities and duties of citizenship. Nothing can be more important, if we are to preserve liberty, than for the people to understand what liberty is and the processes that are necessary for its perpetuation. We, today face the greatest crises in our history. Lawyers alone are trained, by experience and knowledge, to furnish the necessary leadership to safeguard our freedom. Let us discharge that obligation. Each local association is urged to contact either the president of the state association or the state committee on coordination of bar activities with the American Bar Association, or Robert R. Milam, Greenleaf Building, Jacksonville Florida, chairman of the Association's Special Committee on Coordi-

nation and Integration of Effort of State and Local Associations with the American Bar Association.

Promotion of Law Libraries an Important Task

California has a most active state bar association, with sixteen thousand members and substantial income; it has the largest income and membership of any bar association in this country outside of the American Bar Association.

It is doing many things for the benefit of the profession. One, in particular, could well be followed by all other state and local associations. I refer to the efforts now being made in California to assure that adequate law libraries and facilities are properly provided in every county in that state for the use of the Bench and Bar. These are the tools of the profession and are necessary for the proper administration of justice. It would be a fine thing if a similar effort should be made everywhere in the United States by all bar associations. This is a constructive activity than can easily be undertaken and successfully completed during a single year.

New Jersey Shows the Way in Legal Aid

I have referred in previous issues of the JOURNAL to the program of the New Jersey State Bar Association to extend Legal Aid to every county in New Jersey. I am now advised that this program is nearing a successful completion. Eighteen of the twenty-one counties in New Jersey have already organized Legal Aid Societies. By the time of its annual meeting in May it is expected that all the counties will have been organized. If this is achieved, it will mean that New Jersey has become the first state in which legal aid is available without cost to every indigent in civil matters.

This program, together with the Lawyer Reference Plan, will afford the best possible means to avoid government-financed and government-controlled legal aid in this country. Such an experiment has been started in England and articles in current local publications in this country indicate there is much thinking along the line of a similar program here. We must forestall such a program. The independence of our profession demands it. I urge all state and local associations actively to get behind a program in their respective state and local bar associations to extend Legal Aid throughout their own states, and also to develop and extend the Lawyer Reference Plan.

1950 ANNUAL MEETING

Washington, D.C., September 18-22, 1950

The Seventy-Third Annual Meeting of the American Bar Association and the Thirty-Second Annual Meeting of The Canadian Bar Association will be held jointly, in Washington, D. C., September 18 to 22, 1950. Further information with respect to the meetings will be published in forthcoming issues of the *Journal*.

Requests for reservations should be addressed to the Reservation Department, American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois, and should be accompanied by payment of $5.00 registration fee for each member of the Association for whom reservation is requested. Be sure to indicate three choices of hotels, and give us your definite date of arrival as well as probable departure date.

Detailed announcement with respect to the making of hotel reservations for members of the Association may be found in the January issue of the *Journal*, at page 74.

ALL SPACE AT MAYFLOWER, STATLER, CARLTON AND HAY-ADAMS HOTELS EXHAUSTED.

AMERICAN BAR ASSOCIATION
Journal

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *Page Tom Paine!*

On March 27 the Supreme Court affirmed the conviction of Eugene Dennis, General Secretary of the Communist Party in the United States, for contempt of the House Committee on Un-American Activities. Mr. Justice Jackson, concurring in the result, said:

> It is true that Communists are the current phobia in Washington. But always, since I can remember, some group or other is being investigated and castigated here. At various times it has been Bundists and Germans, Japanese, lobbyists, tax evaders, oil men, utility men, bankers, brokers, labor leaders, Silver Shirts and Fascists. At times, usually after dramatic and publicized exposures, members of these groups have been brought to trial for some offense.

The Star Chamber aspects displayed by certain congressional committee investigators will be deplored by the American Bar generally. The public has witnessed confusing exhibitions of violent and passionate temper, appeals to popular or minority prejudices, inciting of deep-seated hatreds, and the imputing of sinister and perverted motives. Such displays are among the techniques used by pettifogging demagogues. Charges and criticisms that are unreasoned, hateful and malicious will only convince the shallow-minded, the prejudiced and the perverse. Such tactics are condemned by the great body of sober-minded Americans.

If we are to pay more than hypocritical homage to the Bill of Rights' principle of free speech, we must subscribe to that transcendent expression of tolerance that Jefferson voiced in his great First Inaugural Address in these words: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

It gives lawyers an uneasy feeling to realize that a man's good name may be filched from him, his reputation attacked in most opprobrious terms, and yet that he will be denied an opportunity to put into the committee's record any evidence to refute those charges. The result is that a cautious man may be cowed into silence. This is censorship of unpopular ideas by the majority through the use of intimidation and the threat of public castigation. It is even more disturbing to see contempt charges predicated upon a refusal by a witness, under subpoena, to answer a question on the ground that it may incriminate him. This raises the shadow of an inquisition. Americans have never approved of Torquemada's tactics.

The price of free speech is that we shall hear unpopular as well as popular truth. If speech is to be free, men must be left free to speak slander and falsehood; free to give vent to malicious and emotional feelings for political and propagandist purposes. In the absence of a clear and present danger, the remedy provided by the law of defamation has in the past been considered adequate. A democracy is based on the assumption that the people are capable, after hearing all sides, of sorting the wheat of truth from the chaff of error. If the test of truth is its ability to get itself accepted in the competition of the marketplace of ideas, truth must expect to be jostled about in that marketplace by defamation, exaggeration, falsehood and propaganda. Truth will be tough enough to survive the jostling.

Lawyers must be both discerning and courageous enough to stand their ground when that jostling reaches the point where fundamental constitutional liberties are infringed. Their duty is to encourage and to exhibit that true spirit of temperate and patriotic consideration of the facts which lead to the truth. Members of the Bar will best fulfill their traditional responsibility for leadership of public opinion if they adopt the middle ground of temperate consideration and avoid both hasty or radical snap judgments on the one hand and the mistaken conservatism of blind obstinacy on the other. They will not forget Tom Paine's warning: "An avidity to punish is always dangerous to liberty. It leads men to stretch, to misinterpret, and to misapply even the best of laws. He that would make his own liberty secure, must guard even his enemy from oppression; for if he violates this duty, he establishes a precedent that will reach to himself."

■ *A Problem of Coördination*

Is the bar examination process functioning effectively in your state? Do your bar examiners keep themselves accurately informed regarding current law school training? Do the law school teachers keep abreast of the particular needs of the profession? Do they check their curricula to determine whether or not they are really giving a well-rounded course of instruction? These and many other questions of vital concern to the public and to the profession are considered in a challenging and enlightening report prepared by Professor Harold Shepherd of the faculty of the School of Law of Stanford University as a part of the Survey of the Legal Profession pertaining to bar examinations and requirements for admission to the Bar.

His report is based upon the answers given by several hundred bar examiners, law school deans, lawyers, teachers and others to searching questions regarding the degree of coöperation that exists between the bar examiners and the law school teachers in achieving a common objective of selecting those qualified and worthy to practice law.

Professor Shepherd's report invites attention to the unpardonable failure on the part of the two groups in many states to provide for a free interchange of information and discussion of ways and means best adapted to integrate their work to achieve this desirable objective.

The report shows that in too many states no effective attempt is made to integrate the work of law schools and the bar examiners in adequately solving the problems for which there is a joint responsibility. Each group tends to work in its own air-tight compartment and to view in isolation the bar examiners' function. As Professor Shepherd points out, the bar examiners' function is only a part of the process, a segment of a larger and more basic problem—who shall be permitted to practice law.

The report shows there is a sincere desire on the part of a large majority of the law schools and most of the bar examiners to get together for mutual consideration of common problems. Some of these problems are

What is the bar examination intended to test?

What subjects should be included in the bar examinations?

How many questions should be included in the bar examinations?

How much time should be allowed for answering each essay-type question?

How should the passing mark on a bar examination be determined?

Should optional or alternative questions be included in bar examinations?

How is a good bar examination question prepared?

What are the best sources for bar examination questions?

What are the reasons for failure in bar examinations of applicants with good law school records?

What steps should be taken to eliminate unqualified law students prior to date for graduation from law school?

Should a preliminary bar examination be given at the end of the first year of law study to law students who do not attend accredited law schools?

These are only a few of dozens of questions that have not been answered satisfactorily in many jurisdictions. These problems can be effectively solved if a proper forum is provided for representatives of the judiciary, the bar examiners, the law schools and the Bar to get together to consider them. Such committees, usually known as "committees on coöperation", have been functioning in a few states for twenty years or longer. The results achieved have been outstanding where the committee assignments have been taken seriously and where sufficient time is devoted to research and study of the problems. Merely getting together will not do the job. It may create a closer and more friendly relationship between the groups represented, but this is not enough. There must be a thorough study of each of the questions to be considered. Subcommittees should be appointed to make these studies and to prepare complete reports with recommendation. These reports should be submitted to the full membership of the committee. At least two meetings of the full committee should be held each year. Carefully prepared agenda should be sent to each member in advance of the meetings, and all the members should come to the meetings thoroughly briefed on the questions to be considered. Funds to cover travel expenses should be provided by the state, the state and local bar associations and the law schools.

Preparation for admission to practice law is almost an exclusive function of the law schools. Bar examinations must be geared to fit law school preparation. If they are not, there is something wrong—either with the bar examiners or the law schools. If objections to law school training and the bar examination process are to be avoided there must be a clear realization of the unity of function in selecting qualified and worthy applicants for admission to practice law. This must be complemented by the opportunity for free interchange of information and constructive criticism. Active, hard-working "committees on coöperation" in every state are the best answer to these problems until such time as a National Standard Bar Examination is available.

Professor Shepherd's report will be found in the March-April, 1950, issue of the *Bar Examiner*. It makes interesting and informative reading for every lawyer who is concerned about the future personnel of the legal profession.

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

Editorial From a Member of Our ADVISORY BOARD

■ *Second Issue of Notes*

Notes of a District Judge, Part II, has been published. The warmth of reception given to the first brochure of this title indicated that a second might follow. Part II will gratify the expectations of readers. The author is Judge Claude McColloch of Portland, Oregon.

It is difficult to describe these little booklets to those who have not seen them. They have no theme or thesis. They are random comments of the author on men, events and trends, with interesting quotations and sentiments interspersed. Yet they have unity and purpose because they carry an aura of the author's attractive personality and the overtones of his concern for our country and its judiciary—especially the trial judges. The dedication is "To My Brother District Judges".

Judge McColloch is a patriot. He says:

> *Patriotism*—let's not be ashamed of the word.

His father was a judge and the son is a champion of the high traditions of our jurisprudence. He says:

> With Socialism in the Air—our Profession is walking on thin ice. Unfortunately, a large number of the younger men have been trained by their teachers to be ashamed of their Profession; to Disparage it.

At another place (page 10) he says:

> The people do not want their courts weakened.

He is moved, not by a vain pride of position, but by a reverence for the judicial function and a warm friendship for other men of the Bench. He says:

> One of the joys of being a District Judge is the friendships one makes with other Judges. I had not thought it was possible to meet so many fine new men and to become warm friends with them. I had thought that joy was left behind with college and young professional days.

Everyone familiar with the history of our political institutions will know that there is reason for Judge McColloch's anxiety about the erosion of our trial courts. Our rights and liberties were forged and formed in the great Court of Common Pleas. Magna Charta and the United States Constitution created independent courts for the protection of rights and liberties that were and are a part of our heritage. And today the security of such rights and liberties is found, not primarily in free elections or in legislatures or executives, but in readily accessible trial courts, presided over by independent, learned and courageous judges.

Judge McColloch says:

> The trial judges have taken a lot of hammering from sentimentalists and *from above*

and warns:

> It is of great importance that the tradition of *strong trial judges* should be maintained.

If your liberty were denied, to whom would you go for help?

ROBERT N. WILKIN
Cleveland, Ohio

Proposed Amendments to the Constitution and By-Laws of the American Bar Association

To be presented and acted upon at its Seventy-Third Annual Meeting at Washington, D. C., September 18-22, 1950

■ TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION AND OF THE HOUSE OF DELEGATES:

Notice is hereby given that Osmer C. Fitts, of Brattleboro, Vermont, James L. Shepherd, Jr., of Houston, Texas, W. E. Stanley of Wichita, Kansas, Delger Trowbridge of San Francisco, California, and Roy E. Willy of Sioux Falls, South Dakota, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates; and Howard L. Barkdull of Cleveland, Ohio, W. J. Jameson of Billings, Montana, Robert R. Milam of Jacksonville, Florida, Franklin E. Parker, Jr., of New York, New York, and James L. Shepherd, Jr., of Houston, Texas, members of the Association and members of the Committee on Scope and Correlation of Work, have filed with the Secretary of the Association the following amendments to the Constitution and By-Laws of the Association, and Rules of Procedure of the House of Delegates:

(1) Amend Article VI, Section 3 of the Constitution as follows:

In line 27, after the words, "The President", add the words, "President Elect"; in line 30, after the words, "Former Presidents of the American Bar Association" add the words "and former Chairmen of the House of Delegates"; in line 33, strike out the word "Presidents" and substitute therefor the word "officers"; change the word "becoming" in line 33 to "to become" and "continuing" in line 34 to "to continue"; so that lines 27 to 35 inclusive will read as follows:

> The President, President Elect, Secretary and the Treasurer of the Association;
>
> The members of the Board of Governors;
>
> Former Presidents of the American Bar Association and former chairmen of the House of Delegates who register in attendance at any annual meeting of the Association by 12 o'clock noon on the opening day thereof, the membership of such former officers to become effective upon registration and to continue until the opening of the next annual meeting.

(2) Amend Article VI, Section 9 of the Constitution by striking out the sentence in lines 9-11, which now reads, "The President of the Association, or, in his absence, the Chairman of the House of Delegates, shall preside at the meetings of the House of Delegates", and substituting therefor the following:

> The Chairman of the House of Delegates shall preside at all of its meetings.

(3) Amend Article VII, Section 1 lines 3 and 4 the words "the last re-tiring president" and substituting therefor the words "President Elect"; and by striking from lines 16 and 17 the words "in the absence of the President", so that the final sentence of Section 1 will read:

> The Chairman of the House of Delegates shall be the presiding officer of the Board of Governors.

(4) Amend Article VIII of the Constitution as follows:

(a) Strike out present sections 1, 2, and 3 thereof and substitute the following:

> SECTION 1. *Officers.* There shall be the following officers of the Association: A President, a President Elect, a Secretary, a Treasurer and a Chairman of the House of Delegates. Each officer shall be chosen in the manner and for the terms hereinafter provided.
>
> SECTION 2. *President.* The President Elect shall become President of the Association at the adjournment of the next annual meeting following the meeting at which he was elected. His term as President shall continue until the adjournment of the next following annual meeting. He shall not thereafter be eligible to hold the office of President or Chairman of the House of Delegates.
>
> SECTION 3. *President Elect, Secretary and Treasurer.* The following officers shall be elected at each annual meeting of the House of Delegates by a majority vote of those present and

voting, and shall serve for the year beginning with the adjournment of the annual meeting at which they are elected and ending with the adjournment of the next annual meeting of the House of Delegates: A President Elect, who shall at the adjournment of the next annual meeting of the House of Delegates following his election become President of the Association; a Secretary and a Treasurer.

SECTION 4. *Chairman of the House of Delegates.* A Chairman of the House of Delegates shall be chosen from the membership of the House of Delegates; shall be elected at the annual meeting of the House of Delegates in even numbered years by a majority vote of those present and voting, and shall serve for the term of two years beginning with the adjournment of the annual meeting at which he is elected and ending with the adjournment of the second following annual meeting of the House of Delegates. He shall not, if elected subsequent to 1950, thereafter be eligible for election to that office nor to the office of President Elect or President.

(b) Renumber present Section 4 as Section 5.

(5) Amend Article IX, Section 1 of the Constitution by changing the word "President" in line 5 to "President Elect", and by adding at the end of the sentence in line 7 the words, "except that, in the year 1951 and in any subsequent year in which the office of President Elect shall become vacant prior to the nominating meeting of the State Delegates, they shall make, announce and publish a nomination for the office of President." The first sentence of Section 1 will then read as follows:

SECTION 1. *Nominations by State Delegates.* The State Delegates from each State shall meet, not later than seventy days before the opening of the Annual Meeting in each year, and shall make, and promptly announce, and publish, a nomination for each of the offices of President Elect, Secretary and Treasurer, and for the members of the Board of Governors to be elected in that year, except that, in the year 1951 and in any subsequent year in which the office of the President Elect shall become vacant prior to the nominating meeting of the State Delegates, they shall make, announce and publish a nomination for the office of President.

(6) Amend Article IX, Section 2 of the Constitution, by changing the word "President" in line 7 to "President Elect", and by adding in line 8, at the end of the sentence, the words, "and may also make nomination for the office of President whenever a nomination for that office shall have been made, announced and published by the State Delegates, as provided in Article IX, Section 1" so that the first sentence of Section 2 will read as follows:

SECTION 2. *Other Nominations.* Not earlier than seventy days nor later than forty days before the opening of the annual meeting, one hundred members of the Association in good standing, of whom not more than fifty may be accredited to any one state, may file with the Secretary a nominating petition (which may be in parts) duly signed, making other nominations for the office of President Elect, Secretary or Treasurer, and in even-numbered years, for Chairman of the House of Delegates, and may also make nomination for the office of President whenever a nomination for that office shall have been made, announced, and published by the State Delegates, as provided in Article IX, Section 1.

(7) Strike out all of Article XIV of the Constitution, "Taking Effect of this Constitution".

(8) Strike out Section 5, Article II of the By-Laws, "Joint Dues", and renumber Sections 6, 7 and 8 as Sections 5, 6 and 7.

(9) Strike out from Article III, Section 1 of the By-Laws the final sentence which reads, "The first and organization meeting of the House of Delegates shall be held, directly following the adoption of these By-Laws, at a time and place to be fixed by the President."

(10) Amend Article VIII, Section 2 of the By-Laws to read as follows:

SECTION 2. *Term of office and vacancies.* The terms of office of all persons elected at any annual meeting shall commence at the adjournment of such meeting. Vacancies in any office, except the House of Delegates, the elective members of the Board of Governors, and the President Elect, shall be filled by the Board of Governors for the remainder of the term. A vacancy in the office of President Elect at any time prior to the time when the President Elect becomes President shall be filled in the manner provided in Article IX, Sections 1 and 2 of the Constitution, and he shall become President of the Association at the adjournment of the Annual Meeting at which he is elected.

(11) Amend Article X, Section 6 of the By-Laws by adding a new line after line 16, Membership, to read

Peace and Law through United Nations

(12) Amend Article X, Section 7 of the By-Laws by inserting a new subsection (o) as follows:

(o) *Committee on Peace and Law through United Nations.* This committee shall have jurisdiction to study and report to the House of Delegates from time to time with respect to all matters relating to the United Nations, and to all international tribunals, resolutions, declarations, treaties, conventions, pacts and agreements which affect the rights and liberties of the American people. This shall not limit the jurisdiction of the Section of International and Comparative Law to study and report to the House on these or any other matters within the jurisdiction of the Section.

Renumber present subsections (o) to (v) inclusive, as subsections (p) to (w) inclusive.

(13) Amend Rule II of the Rules of Procedure of the House of Delegates by striking from lines 1 and 2 the words "The President of the Association, or, in his absence from the chair", and in lines 3 and 4 the words, "both the President and" so that the first two sentences of Rule II will read as follows:

1. The Chairman of the House of Delegates shall preside at meetings of the House. In the absence of the Chairman of the House, the House shall choose *viva voce* a Chairman *pro tempore*.

(14) Amend Rule X, Section 1 (a) of the Rules of Procedure by striking from line 27 the word "President" and substituting therefor the words "Chairman of the House of Delegates", so that the last sentence of Section 1 (a) will read as follows:

Such report shall be in the form of a summary of its minutes, and shall be signed by the Chairman of the House of Delegates and Secretary.

JOSEPH D. STECHER
Secretary

"Books for Lawyers"

MOORE'S COMMENTARY ON THE U. S. JUDICIAL CODE, *by James William Moore. Albany: Matthew Bender & Company. 1949. $12.00. Pages 684.*

This is a comprehensive and clearly written treatise on the Revised Judicial Code from the pen of the able and scholarly Professor James William Moore of Yale University, author of the well known work on federal procedure and one of the consultants who aided in the drafting of the Revised Code. It is hardly necessary to say that the work has been thoroughly and painstakingly done and that the result is an illuminating and authoritative commentary on a subject of the greatest importance to lawyers and judges.

The Revision of the Judicial Code, Title 28 of the United States Code, is not a mere codification, only *prima facie* correct, as was original Title 28. Like the revision of the Revenue Code, Title 26, it is a statute in its own right and is to be treated as such, and not as mere evidence of the law contained in other statutes. The whole field of law covered by the code has been carefully gone over and statutes thought to be in conflict have been expressly repealed. The changes made have not been limited to mere matters of style and expression but have included substantive matters of the first order of importance. All of these Professor Moore carefully points out, giving the old statutory provisions and the reasons why changes were thought desirable, as well as the provisions finally adopted. The discussion is not confined, however, to the changes made in the Code. All its provisions, whether embodying changes or not, are carefully explained in the light of their history and purpose and the interpretation given them by the courts.

The Revision of the Judicial Code has come as the latest in a series of efforts to modernize and simplify the jurisdiction, practice and procedure of the federal courts. Only recently the practice in those courts was the worst, I think, to be found in any English-speaking country, unbelieveably technical and complicated and full of traps and pitfalls for the unwary. Reform was accomplished through the adoption of the civil and criminal rules under the acts of 1934 and 1940 and the setting up of an integrated system of administration and supervision under the Administrative Office Act of 1939. These gave the federal courts what may justly be termed a model procedure in civil and criminal cases and an efficient system of administration. They were still hampered, however, by obsolete statutory provisions relating to such matters as jurisdiction, venue, transfer and removal of causes, stay of proceedings in other courts, etc. In addition to this, much confusion had been introduced into the practice by the overruling of settled interpretations of existing statutes, as in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, and *Toucey* v. *New York Life Insurance Company*, 314 U. S. 118, or such extension of doctrine as was involved in *Neirbo Company* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165. There had been no revision of the statutes relating to the judiciary since the Judicial Code of 1911; and a revision which would bring this important branch of the statutory law up to date and remove the uncertainties that had arisen was badly needed. This the Revised Judicial Code has done in an admirable way and Professor Moore's commentary makes clear just what has been done and how and why.

It is not possible in a brief review of this sort to give any adequate résumé of the book's contents. Some idea of the coverage may be gained from a list of the chapter headings: "History of the Judicial System"; "General Analysis of the Code"; "Court Organization"; "Venue and Forum Non Conveniens"; "Removal"; "Particular Matters and Proceedings"; "Jurisdiction of Courts of Appeals"; "Supreme Court Jurisdiction"; "Rule Making and Amendments". Under "Particular Matters and Proceedings" are included such important subjects as equity receivers, state law as rules of decision, *habeas corpus*, and stay of state court proceedings.

Of particular interest and importance because of the vital changes of the law with which they deal are the chapters relating to venue, *forum non conveniens*, removal from state to federal courts and the stay of state or federal court proceedings. Of special interest also is the section dealing with the change made in the application of the Rule of Decisions statute by *Erie* v. *Tompkins*. I know of no other treatise in which this intricate and troublesome subject has been so thoroughly and adequately dealt with.

In writing this scholarly treatise to explain not only the changes made by the Revised Code but also the reason and purpose which underlie all of its provisions, Professor Moore has added to the already heavy debt of gratitude owed him by the profession for his labors in the field of federal jurisdiction and procedure.

JOHN J. PARKER

Charlotte, North Carolina

PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT. *By Cyrus Austin. Published by Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association, 133 South 36th Street,*

Philadelphia 4, Pa. 1950. $2.00. Pages 163. [Copies can be obtained from the American Law Institute.]

Businessmen for years have complained of the generality of the Sherman Antitrust Act, and have petitioned in the interest of clarity for detailed specification in legislation of this nature. Then the Robinson-Patman Act with its intricate provisions was enacted, and businessmen commenced to learn to their dismay that antitrust principles do not lend themselves readily to minute inflexible specification. The revealing discovery was made that Congress after all legislates best in this field where it lays down general principles, as in the Sherman Act, to be worked out case by case in the light of the rule of reason; that when it attempts through comprehensive Robinson-Patman provisions to nail down regulatory details it inevitably discloses its inherent inability to anticipate all applications of those details to our complex economy.

We must, nevertheless, live with the Robinson-Patman Act and its detailed confusion. It is on the statute books, and presumably will stay there, as antitrust legislation is frequently amended but seldom repealed. For this reason the American Law Institute and Mr. Austin are to be congratulated for having so intelligently continued in *Price Discrimination and Related Problems under the Robinson-Patman Act* the review of this field initiated by Professor Oppenheim in his comprehensive Institute syllabus on the Act. The lawyer in this field very much needs the comfort of the rod and staff of expert analysis to shepherd him through the dim labyrinths of this legislation.

Mr. Austin in his treatise has set forth concisely major problems raised by the Robinson-Patman Act, has marshalled effectively the available authorities relating thereto, and has interspersed throughout his analysis helpful and stimulating commentary. You may not always agree with what he says, but you will uniformly find his views of interest. He has not, of course, sought to make crystal clear particular legislative provisions that are fundamentally unclear, as this would be misleading to the uninitiated reader. Rather he has constructively endeavored to reduce this confusion wherever possible, and, when confusion is inevitable, to advance suggestive observations.

In the great majority of problems raised by the Act, of course, there is little or no precedent or other guide. Mr. Austin to his credit does not attempt to use this lack of substantial authority as an excuse to avoid these problems, but rather boldly discusses them at length, weighing the bits and snatches of authority and reaching specific conclusions. His arguments pro and con are ingenious and thought-provoking. In short, Mr. Austin's treatise is most timely and heartily to be recommended.

Mr. Austin has very properly prefaced his treatise with the caveat that the law in this field is in a state of development, and that his statements should be evaluated accordingly. This is particularly true in the light of the over-all controversy presently raging in Congress and in the courts between the proponents of "soft" competition as against those favoring "hard" competition. The Robinson-Patman Act, the fair trade laws and the various legislative enactments exempting special classes and industries from the antitrust laws on the one hand seek to mitigate the rigors of competition; the Sherman Act, on the other hand, resolutely champions vigorous competition. The proponents of "soft" competition would favor the Robinson-Patman Act and companion legislation and whittle away the impact of the Sherman Act; whereas those advocating "hard" competition would reverse this process. Both major enforcement agencies, the Department of Justice and the Federal Trade Commission, number on their staffs some active proponents of each school, and it is not uncommon today to find two cases being prosecuted simultaneously under theories that are basically opposed. A possible indication of the outcome of this controversy may be provided before this review goes to press by the disposition of the so-called basing point bill (S. 1008) currently before Capitol Hill, which would ensure the right to cut prices to meet competition under the Robinson-Patman Act, and of the *Standard Oil of Indiana* litigation on the same issue now awaiting decision by the Supreme Court.

JERROLD G. VAN CISE
New York, New York

MAX D. STEUER: TRIAL LAWYER. *By Aron Steuer, New York: Random House. 1950. $3.50. Pages 301.*

On the front page of the *New York Times* that reported the death of Max Steuer also appeared the news of the death of Trotsky. Selective Service was a hot issue in the Senate; Wendell Willkie was to spend the afternoon going over campaign plans with Joe Martin; and the Nazis had dropped a bomb "shaped like a torpedo" on a town in southeast England. In ten years a good deal of water has passed under the bridges. Yet despite the lapse of time, Judge Steuer, in place of the story of his father, gives us a study of the art of advocacy.

The book mainly concerns five of Steuer's cases as examples of the technique of cross-examination. In each instance background material is skillfully furnished to permit intelligent following of the course of the interrogation, which is reproduced verbatim with some excisions. In the first case reported, Steuer defended Frank Gardner against a charge of attempting to bribe Otto Foelker, then a state senator, to vote against a bill to outlaw betting on horse races. Gardner was a somewhat disreputable lobbyist for the racing interests, while Foelker was the darling of reform. It was the word of one against the other. Steuer's tactics on cross-examination consisted principally in showing that Foelker had used a stand-in to pass the Regent's examination qualifying him for the

bar examination. Omitted from the account for some reason is the question *"Parlez-vous français?"* asked at the outset of the cross-examination, with the witness stammering, "I don't know what you mean", although he had passed the examination in French with a grade of 100. Foelker was unable to say what a logarithm was and thought "syntax" was a medical term, although both were involved in the examination in question. He left the stand a broken man, spiritually and politically, and Gardner was acquitted.

In *People* v. *Harris and Blanck*, Steuer represented two manufacturers of shirtwaists whose loft building burned with the death of over a hundred girls. Defendants were charged with violating the fire laws. One Kate Alterman, a survivor, was the prosecution's main witness, and her story was graphic. Gently Steuer had her repeat it; then twice more. After the third repetition he suggested that she had omitted a word, which she obligingly supplied. It was obvious that she had been thoroughly coached. In the defense of Tex Rickard on a charge of statutory rape, the complaining witness took the stand as an innocent child who had been woefully outraged and left it as a discredited little tart whom no one could possibly believe. *Oppenheim* v. *Metropolitan Street Railways* involved the final downfall of an ambulance chaser who had been disbarred, later reinstated, and then sued those whom he claimed were responsible for his disbarment. Finally, *Sherman* v. *International Publications* is an illustration of the technique of strangling a witness with rope made from the written words of the plaintiff in whose behalf he testified.

As an exposition of the art of cross-examination, the book is excellent. As the story of a colorful and controversial figure it is disappointing. Judge Steuer specifically disclaims any effort at biography, and instead offers "the elements of mind and character which made the man", in a brief thirty-five page introductory sketch. The resulting impression is that of a colorless legal machine with the human element largely eliminated.

A slightly defensive note is perceptible, as if Judge Steuer had felt the need to rehabilitate his father. During his lifetime Steuer was a center of controversy. *Time*, in an obituary notice, described him as a "slick, hawk-faced criminal lawyer who rescued many a careless bigwig and stumbling mobster from legal quicksands". The *New York Times* was more kindly. "Mr. Steuer has been called by some the country's greatest criminal lawyer of his time. His list of clients has been likened to an abbreviated Who's Who to which might be appended an impressive list of underworld characters."

A year after Steuer's death, the Luce animus against him had not abated, and there appeared in *Life* a derisive story of the sale of the Steuer art collection, with photographs of lush nudes and various Victorian horribles. This was followed promptly by a complete retraction to the effect that only one of the *objets d'art* photographed or mentioned, and that a very inoffensive one, had been in the Steuer collection, and *Life* apologized handsomely for having conveyed an impression contradictory to the "modest and admirable facts" of Mr. Steuer's private life. The interesting thing is that such a story should have been published in the first place.

Few of the colorful events of the career of the immigrant boy whose income from practicing law rose to more than a million dollars a year have been allowed to creep into Judge Steuer's account. Nothing is said of the triumphant acquittal in disbarment proceedings brought by those to whose discomfiture he had contributed. Nothing is said of behind-the-scene relations with Tammany Hall. Nor is there any mention of the lifelong feud between Steuer and Isidor Kresel, ending with the latter's downfall upon the closing of the Bank of the United States.[1] The devastating arguments are omitted. "Experts! Experts! They are like asparagus. You buy them by the bunch!"[2] No reference is made to Steuer's practice of wearing cheap clothes in court. "Corporation lawyers can wear a morning coat, but I don't want to be dressed any better than the jurors." Papers were brought into court tied up in wrapping paper in place of a brief case. Possibly none of these things indicates the "elements of mind and character which made the man", but they are powerfully interesting.

Judge Steuer has erected a two-dimensionable marble tablet to his father, but his father was a three-dimensional man. Perhaps before time goes too far in converting reality to legend he will give us the whole story. It will be worth waiting for.

EDWARD W. CLEARY
University of Illinois
Urbana, Illinois

1. Numerous interesting items will be found in Boyer, *Max Steuer: Magician of the Law* (1932).
2. Quoted in Busch, *Law and Tactics in Jury Trials* (1949) 308.

WIDOWS WISE AND OTHERWISE. *By Gladys Denny Shultz. Philadelphia and New York: J. B. Lippincott Company. 1949. $3.50. Pages 285.*

Mid-century America has become the haven of the specialist. Experts and pseudo-experts alike are being called upon in ever-increasing numbers to serve as counsel to the non-expert members of the population. Volumes have been published—and published successfully—telling Americans how to build their own homes, how to mix drinks, and how to win friends and influence people. Now comes "A Practical Guide for the Woman Who Has Lost Her Husband".

Widows Wise and Otherwise begins with an explanation of the fact that "Any Wife Can Become a Widow" and ends with a discussion and analysis entitled "Should You Re-Marry?" In between, the author deals with such varied and divers questions as funeral costs, the widow's mite, the widow as a citizen and the sex problems of the woman alone.

But while most of the volume is devoted to matters peculiar to widows, several chapters are of considerable interest to the legal profession. The lawyer will learn no law from *Widows Wise and Otherwise*, but he will learn much about the lay view of the legal fraternity.

Chapter III of the volume bears the title, "You Need a Lawyer!" The author, an attorney's widow, devotes much space to a discussion of the business problems that beset the woman that has lost her spouse, and then asserts:

"I believe it should be obvious by now that you need a good, well-informed lawyer to direct you through all these legal mazes, and business and personal pitfalls, preferably one who knows your personal circumstances."

She follows with this advice: "Besides directing you through the legal routines made necessary by your husband's death, or perhaps relieving you of them altogether except for the signing of papers, the right kind of lawyer will see to it that you get the full benefit of the protections offered you by the law; that your husband's affairs are worked out as advantageously as possible; that you don't get involved in costly and unpleasant messes. (If, that is, you follow his advice!) He will give you realistic and objective counsel in your personal affairs."

But despite Mrs. Shultz's appreciation of the need of widows for legal assistance, she is still a layman—with the traditional lay suspicion of the men of law. Not only does she make continued reference to the "right kind of lawyer", but she is quick to suggest a visit to the court or the local bar association grievance committee if the widow is dissatisfied with her bill for legal services.

Widows Wise and Otherwise is light reading, well written. And, while it is primarily designed for the widow in distress, the chapters on insurance, investments and estate planning are well worth an hour of legal reading time.

ALBERT P. BLAUSTEIN
New York, New York

VERDICT IN DISPUTE. *By Emil Lustgarten. New York: Charles Scribner's Sons. 1950. $2.50. Pages 253.*

It is perhaps misleading to describe this small volume (to quote the blurb on the dust jacket) as an examination of "six of the most notable murders of the past 60 years, the subsequent trials and the verdicts rendered—verdicts which today are considered open to dispute". The name of books written about controversial criminal cases is legion, and most of them are dull indeed. Mr. Lustgarten's book does not belong among the dry, humorless works of scholars or among the polemics of the propagandist eager to right a wrong. His book would deserve a high place in criminal fiction, except that the trials he describes actually took place. At the same time, it would not be out of place as a textbook in a course—if law schools had such courses— in jury tactics, except that it would be a shame (and no doubt a scandal to those that hold that hard reading makes good lawyers) to condemn such a readable book to the dusty shelves of a law library.

For this is a book to be read, and read as one reads a detective story, seated comfortably in house slippers, before an open fire with the rain beating on the roof.

Mr. Lustgarten has no cause to argue and no sullied names that he wants to purify—he reviews each of the six trials with the impartial mind of the trained barrister and the pen of the skilled novelist. The result will please lawyers and fascinate laymen. To quote his own words, Mr. Lustgarten's purpose is "not only to analyse the facts, but to recreate the atmosphere in which those trials were fought, so that the reader can determine the dominating influences that led to their unsatisfactory result —shortcomings of counsel, ineptitude of judge, prejudice of jury, or any other weakness to which the human race is constitutionally prone". No doubt the principals in these cases would disagree with Mr. Lustgarten's interpretation of the facts, but he probably succeeds in drawing as vivid a picture of the trials and their background as any reporter could, and his version of the facts is surely as good as that of an appellate court reviewing the judgments rendered. He has the advantage of being able to present the cases as he sees them without the responsibility of deciding whether to reverse or affirm. Perhaps this makes his summary more impartial than that of an appellate judge; it certainly is more readable.

Five of the six cases are English, but in the sixth, the famous Lizzie Borden trial, Mr. Lustgarten succeeds in recreating the atmosphere of a small, late-Victorian New England town as well as he brings to life the "featureless district" of Liverpool where the chess enthusiast, William Herbert Wallace, was indicted for the grizzly murder of his wife to whom he had been quietly and happily married for more than eighteen years.

It is impossible to decide which of the six cases Mr. Lustgarten has chosen is most interesting. The American reader, to whom Lizzie Borden is a household name, might cast his vote for her, but if so his choice is probably the result of a doubtful chauvinism that holds that American murders are better than foreign murders. On reading the account of the trial of Norman Thorne, I was struck by the similarity between the facts of that case and the trial of Clyde Griffiths in Dreiser's *An American Tragedy*. Of the two, Lustgarten's short account of the actual Norman Thorne trial seems to me more vivid and more satisfactory than Dreiser's prolonged account of the sufferings of his imaginary defendant.

This is not an "important book" or a book that one "must read"; you will miss a pleasant, profitable evening, however, if you choose the latest "murder mystery" instead. You will also miss the excitement of watching fine advocates practicing their art in a tense courtroom drama. I might add that Mr. Lustgarten has

done no harm to the public relations of the Bar, for this book, though written about six cases that ended in doubtful verdicts, illustrates the problems of achieving justice without the usual untrue insinuations of legal trickery and red tape of most popular books about lawyers and courts.

R. L. Y.

UNFAIR TRADE PRACTICES, CASES, COMMENTS AND MATERIALS – TRADE REGULATION. *By S. Chesterfield Oppenheim, American Casebook Series; Warren A. Seavey, General Editor. St. Paul: West Publishing Co. 1950. $10.00. Pages xxxvi, 1534.*

When Professor Oppenheim's *Cases on Federal Antitrust Laws Including Restraints of Trade at Common Law* was reviewed in the AMERICAN BAR ASSOCIATION JOURNAL in September, 1948 (34 A.B.A.J. 820), it was remarked that, in this field of law, it contained more up-to-date decisions and more valuable law review material than most practicing lawyers were likely to find in any other one place.

Now in this companion book on unfair trade practices, Professor Oppenheim has again performed the same service for lawyers in the field of unfair trade practices.

How great is the service that Professor Oppenheim has rendered can be appreciated only by those that have read through this latest book and have studied all the material he has collected from the decisions and the literature that have accumulated since his first book on *Trade Regulation* was published in 1936.

Even a lawyer who is constantly active in the field of unfair trade practices can hardly dip into Professor Oppenheim's latest book without finding almost everywhere in it some reference to some article or some material that he has never heard of or thought of before in this connection.

Lawyers do not ordinarily buy casebooks. But practicing lawyers who have discovered Professor Oppenheim's casebooks have long since learned that they can find in them valuable material that they are unlikely to find as readily anywhere else.

While law professors of such encyclopedic knowledge as Professor Oppenheim continue to write casebooks, it is certain that practicing lawyers that want the shortest and quickest route to all the decisions and all the literature within these fields of law will continue to buy Professor Oppenheim's casebooks.

GILBERT H. MONTAGUE
New York, New York

THE LINCOLN ENCYCLOPEDIA. *By Archer H. Shaw. New York: The Macmillan Company. 1950. $6.50. Pages xii, 395.*

Another new item in the constantly growing Lincoln literature is a collection published by Archer H. Shaw, chief editorial writer of the *Cleveland Plain Dealer*. Mr. Shaw has made a record in alphabetical form of all of the important oral and written utterances of Abraham Lincoln. These he has arranged in such fashion that they can readily be found and he has cited the source of each of his references. Where appropriate, he has inserted cross-references.

In the introduction to the book, David C. Mearns, Assistant Librarian of Congress, states accurately that there are three blessings that this book confers: (1) To the anxious composer seeking an illustration, example or embellishment of his own writing, he will find Mr. Shaw's collection of Lincoln's prose assorted for his own choosing. (2) The documentarian will find the source of the writer's choice an obvious saving in time. (3) The scholar will find a taking-off point from which to make further investigations. To which might be added this: that by the arrangement of Lincoln's utterances on a single topic such as abolition, equality, or slavery, we are able to follow Lincoln's own development of his thoughts on these vital subjects.

This book will be welcomed by speakers, lawyers, scholars and writers.

EUGENE C. GERHART
Binghamton, New York

LINCOLN COLLECTOR. *By Carl Sandburg. New York: Harcourt, Brace and Company, 1950. Pages xiv, 330.*

Carl Sandburg stands out among American authors as one of the leading writers on Abraham Lincoln. His earlier books dealing with the *Prairie Years* and the *War Years*, as well as *Mary Lincoln: Wife and Widow*, have already given him an eminent place among Lincoln biographers. His latest addition to his books on Lincoln is the story of Oliver R. Barrett's great private collection of Lincoln papers, items, letters and miscellany.

Oliver R. Barrett, a law school graduate of the University of Michigan, practiced law from 1896 until his recent death. During more than a half century he was engaged in the arduous and interesting pursuit of Lincoln items. His collection has been invaluable to Lincoln authors.

Carl Sandburg has in the pages of this book brought together in poetic Sandburg fashion interesting stories and sidelights on these items in Mr. Barrett's great private collection. This book is amply illustrated with photostatic copies of original writings along with photographs that appear in the Barrett collection. Here will be found numerous writings in Lincoln's own hand. Lincoln scholars will find published the Hot Stove Letters, the Bonfire Letters, the Carpetbag Letters.

The letters and other items in the collection furnish an intimate insight into Lincoln without which the biographer of the future would be lost. Thanks to Mr. Sandburg, they are now available for the interested reader. The photographs and relics, of which there are a profusion, revive in a graphic way Lincoln's world of a century ago. Newspaper accounts of Lincoln as President and particularly the accounts of Lincoln's fu-

neral make a surpassing portrait study of the greatest of Americans.

While the book does not give a connected picture of Lincoln's life, such as one might secure from a biography like Albert J. Beveridge's *Life*, or Mr. Sandburg's own *Prairie Years*, nevertheless the book will be found delightful by Lincoln scholars.

EUGENE C. GERHART
Binghamton, New York

LABOR RELATIONS LAW. *By Marcus Manoff. Published by the Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association, 133 South 36th Street, Philadelphia 4, Pennsylvania. 1950. $2.00. Pages 140.* [*Copies can be obtained from the American Law Institute.*]

This valuable book has been prepared, according to the author, for the attorney comparatively unacquainted with labor law. Undoubtedly it will be of real value to such a practitioner grappling with the unfamiliar problems in the labor relations field. But the author is perhaps unduly modest; his book also may serve as a useful reference for the more seasoned practitioner of labor law.

It is a common and relatively accurate impression that practice in the labor relations field today is largely the province of the specialist. Because the successful practice of labor law calls for much more than knowledge of legal principles or skill in advocacy, and because the field is still comparatively new, the development of such a situation perhaps was inevitable. Indeed, substantial areas in the broad field of labor relations law have been occupied to a significant extent by management consultants and labor relations counselors that have moved in to perform services that otherwise might have been provided by lawyers. Particularly is this noticeable in contract negotiations and in the drafting and administration of collective agreements. With the tremendous expansion of the practice of collective bargaining in recent years and the inevitable legal problems presented in legislation affecting labor relations, the importance of labor relations law has been increasingly appreciated by the profession.

The present book should provide a useful tool in the cabinet of the neophyte labor law practitioner. It is comprehensive in its discussion of relevant legal principles, yet clear and concise. After reviewing background material briefly, the author considers problems presented in establishment of a typical collective bargaining relationship, including the determination of bargaining representatives, the negotiation of the collective agreement and arbitration. Then ensues discussion of unfair labor practices by employers and unions, strikes, picketing and related activities, and of procedures related to unfair labor practices. Necessarily, the emphasis is on federal legislation and National Labor Relations Board decisions and procedures, but an adequate treatment of relevant state legislation is provided.

Fairly illustrative of the comprehensive nature of the material covered is the chapter dealing with the determination of bargaining representatives. This initially touches upon such matters as whether bargaining should be undertaken in the absence of certification of the union, how a representation question may be presented to the Board, the preelection problems once before the Board, the effect of the "filing" requirements imposed on unions under the Labor Management Relations Act of 1947, and the necessity for the showing of an interest by participating unions. This is followed by discussion of circumstances that will bar the holding of an election and the effect of unfair labor practices on pending certification proceedings. After treating appropriate unit matters the discussion turns to the conduct of elections, with particular emphasis on the matter of determining who is entitled to vote. Finally, decertification proceedings and the scope of judicial review of representation matters are covered.

This treatment, with the ensuing attention to legal problems bearing upon actual negotiations, properly recognizes that labor law is but one aspect of collective bargaining. The author directs attention to existing loose-leaf services in the field and indicates the need for consulting appropriate texts and articles. Problems relating to intra-association law involving the employee and union, statutory standards as to minimum wages, maximum hours, social security and workmen's compensation are not treated.

In balance, the book is well calculated to assist the comparative novice in rendering service in the labor relations field. It may also well deserve a place in the library of the seasoned practitioner, particularly for its treatment of intricate aspects of the Labor Management Relations Act of 1947, and its discussion of the legal status of labor arbitration. The American Law Institute is to be commended for this latest addition to its series of handbooks for the practitioner.

SYLVESTER GARRETT
School of Law
Stanford, California

A Liberal, modern style, *streamlined*, is a person who thinks the other fellow needs to be managed. A Super-Liberal is a person who wants to be the other fellow's *manager*.

Notes of a District Judge, Part II,
by Claude McColloch, page 15.

Review of Recent Supreme Court Decisions

ADMINISTRATIVE LAW

Administrative Procedure Act Is Applicable To Administrative Hearings in Deportation Proceedings

■ *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 94 L. ed. Adv. Ops. 383, 70 S. Ct. 445, 18 U. S. Law Week 4166. (No. 154, decided February 20, 1950.)

The petitioner, a citizen of China, was arrested by immigration officials on a charge of being unlawfully in the United States. A hearing before an immigrant inspector was held and the inspector recommended deportation. The Acting Commissioner approved and the Board of Immigration Appeals affirmed. Petitioner sought release from custody by *habeas corpus* proceedings in the District Court for the District of Columbia upon the sole ground that the administrative hearing was not conducted in conformity with Sections 5 and 11 of the Administrative Procedure Act. The Government admitted noncompliance, but contended that the Act did not apply. The District Court upheld the Government and the Court of Appeals affirmed.

The opinion of the Supreme Court reversing was delivered by Mr. Justice JACKSON. He reviews the history of the Administrative Procedure Act and the evils that it was intended to eliminate. One such evil, he notes, was the practice of embodying in one person the functions of prosecutor and judge; this case, he says, concerns an administrative hearing that is a perfect example of the practices the unanimous condemnation of which gave impetus to the demand for the reform that the act was intended to bring about.

On the question whether Section 5 of the Act covers deportation proceedings conducted by the Immigration Service, he points out that the Act establishes a number of formal requirements to be applied "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing". The question turns upon the words "adjudication required by statute" he notes, the Government arguing that there is no express requirement for any hearing in the statute authorizing deportation and the petitioner arguing that hearings are required by decisions of the Supreme Court. The legislative history does not clarify the problem, Mr. Justice JACKSON says, but there would be no constitutional authority for deportation unless a hearing was required. The limitation of the application of the Act to hearings "required by statute" exempts "only those hearings that administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion" he says. The words in the Act "exempt hearings of less than statutory authority, not those of more than statutory authority" and here the requirement is read into the deportation statute by the Court in order to save the statute from invalidity.

The question whether Section 7 (a) of the Act exempts deportation proceedings before immigrant inspectors turns upon the language of the Act that says that ". . . nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute". He dismisses the Government's argument that immigrant inspectors are "specially provided for by or designated pursuant to" Section 16 of the Immigration Act, saying that nothing in Section 16 specially provides that immigrant inspectors shall conduct deportation hearings or be designated to do so. There is no basis in the "purposes, history or text of this Act for judicially declaring an exemption in favor of deportation proceedings from the procedural safeguards enacted for general application to administrative agencies" he says.

Mr. Justice DOUGLAS and Mr. Justice CLARK took no part in the consideration or decision of the case.

Mr. Justice REED wrote a dissenting opinion. He says that he disagrees with the majority about the proper interpretation of the Administrative Procedure Act. "It seems to me obvious that the exception provided in § 7 (a) covers immigrant inspectors dealing with the arrest of an alien for violation of the Immigration Act. The examination of arrested aliens at a deportation proceeding is surely a specified class of proceedings under § 7 (a) of the Administrative Procedure Act, and it is surely conducted by an officer 'specially provided for by . . . statute'" he declares.

The case was argued by Irving Jaffe for Wong Yang Sung, and by Robert W. Ginnane for McGrath.

CONSTITUTIONAL LAW

Upon Claim Before Governor by One Convicted of Capital Offense That He Became Insane After Sentence, Due Process Requires Neither Opportunity for Hearing nor Judicial Review of Governor's Decision

■ *Solesbee* v. *Balkcom*, 339 U. S. 9, 94 L. ed. Adv. Ops. 396, 70 S. Ct. 457, 18 U. S. Law Week 4175. (No. 77, decided February 20, 1950.)

Solesbee was convicted of murder in a Georgia court and was sentenced to death. He asked the Governor of Georgia to postpone execution on the ground that he had become insane after conviction and sentence. The Governor, after receiving the report of physicians, determined that he was sane. The questions on appeal before the Supreme Court were whether due process required that the claim of insanity be determined by a judicial or administrative tribunal after notice and hearings in which the convicted could be represented by counsel, cross examine witnesses and offer evidence, and whether, if the tribunal were administrative, its findings must be subject to judicial review. The Georgia Supreme Court

Reviews in this issue by Rowland L. Young.

held that the proceedings had met the standards of due process.

Mr. Justice BLACK delivered the opinion of the Court affirming. He declares that "postponement of execution because of insanity bears a close affinity not to trial for a crime but rather to reprieves of sentences in general". This power has traditionally rested in the executive, he says, and has seldom, if ever, been subject to judicial review. It is a universal common-law principle, he says, "that upon a suggestion of insanity after sentence, the tribunal charged with responsibility must be vested with broad discretion in deciding whether evidence shall be heard. This discretion has usually been held nonreviewable by appellate courts". There is no indication that either the Governor or the physicians who examined the petitioner and found him sane, under the provisions of a Georgia statute, violated the "humanitarian policy of Georgia against execution of the insane" he declares.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a dissenting opinion. He holds that the ancient English law did not countenance execution of a person *non compos*. American law is not more brutal than what is revealed as the unbroken command of English law for centuries preceding the separation of the Colonies, he declares. It is not a question of the executive's discretionary prerogative of mercy, he continues, for the due process clause says to a state "thou shalt not". Since it is a violation of due process to execute an insane man, he says, the convicted must be given an opportunity for a fair hearing on the question of his alleged insanity.

The case was argued by Benjamin E. Pierce for Solesbee, and by Eugene Cook for Balkcom.

CRIMINAL LAW

Phonograph Records Held To Be Included Within Prohibition of Shipment in Interstate Commerce of Obscene Books or "Other Matter of Indecent Character"

■ *United States* v. *Alpers*, 338 U. S. 680, 94 L. ed. Adv. Ops. 353, 70 S. Ct. 352, 18 U. S. Law Week 4116. (No. 217, decided February 6, 1950.)

Section 245 of the Criminal Code of the United States makes it illegal to ship in interstate commerce any "obscene . . . book, pamphlet, picture, motion picture film, paper, letter, writing, print, or other matter of indecent character". In the District Court, Alpers was convicted of violation of this section. The alleged violation occurred when he shipped in interstate commerce certain phonograph records that were admittedly obscene. The Court of Appeals for the Ninth Circuit reversed conviction, noting that the words "book, pamphlet", etc., in the statute refer to articles comprehensible to the sense of sight only, and held that phonograph records were not included within the prohibition of the statute, applying the rule of *eiusdem generis* to its language.

Speaking for the Supreme Court, Mr. Justice MINTON reversed. He declares that application of the *eiusdem generis* rule to the statute in this case would "defeat the obvious purpose of legislation", which in this case was to prevent "the channels of interstate commerce from being used to disseminate any matter that, in its essential nature, communicates obscene, lewd, lascivious or filthy ideas". Nothing in the statute or its history indicates that it was intended to apply only to such indecent matter as is sensible to sight, he says.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice BLACK, joined by Mr. Justice FRANKFURTER and Mr. Justice JACKSON, dissented. Criminal statutes should be couched in language sufficiently clear to apprise people of the precise conduct that is prohibited, he says. Judicial interpretation should not expand statutory language to include conduct that Congress might have barred but did not, he says, especially when, as here, the statute results in censorship.

The case was argued by Joseph W. Bishop, Jr., for the United States, and by A. J. Zirpoli for Alpers.

FEDERAL TRADE COMMISSION

Corporation May Be Required by Federal Trade Commission To File Report Showing That It Has Complied with Court Decree Enforcing Commission's Cease and Desist Order

■ *United States* v. *Morton Salt Company, United States* v. *International Salt Company*, 338 U. S. 632, 94 L. ed. Adv. Ops. 358, 70 S. Ct. 357, 18 U. S. Law Week 4128. (Nos. 273 and 274, decided February 6, 1950.)

In these cases, the Supreme Court held that the Federal Trade Commission had the power to require the Morton Salt Company and the International Salt Company to file reports showing how they had complied with a decree of the Court of Appeals for the Seventh Circuit enforcing a cease and desist order entered by the Commission. The order affirmed by the Court of Appeals required respondents and eighteen other salt producers and a trade association to cease and desist from certain practices in connection with the pricing, producing and marketing of salt.

Some four years later, on September 2, 1947, the Commission ordered highly particularized reports to show continuing compliance with the decree. This was done without application to the court and is not provided for under Section 5 of the Federal Trade Commission Act, under which the Commission's original cease and desist order was issued. Some of the producers and the salt trade association reported satisfactorily. Morton and International informed the Commission that they had complied with the decree but that they doubted whether the Commission had jurisdiction to require further reports and declined to supply the information demanded. Neither requested a hearing or made objection to the scope of the order. The District Court refused to grant a mandatory injunction, finding no dispute as to material facts, and dismissed for want of jurisdiction. The Court of Appeals affirmed (33 A.B.

A.J. 822; August, 1947). Before the Supreme Court, Morton and International contend (1) that the Commission's order is an interference with the decree of the Court of Appeals and an invasion of its powers; (2) that the Commission's rule under which the order was made is *ultra vires* and violates the Federal Administrative Procedure Act; (3) that the procedure is not authorized by the sections of the Act on which it is based; and (4) that the order is novel and arbitrary and violates the Fourth and Fifth Amendments. The Supreme Court, speaking through Mr. Justice JACKSON, rejected each of these contentions.

As for the first objection of the companies, Mr. Justice JACKSON says that the Court's decree did not relieve the Commission of its responsibility for preventing unfair competition. The function of an administrative body like the Commission is more akin to that of a grand jury than of a court, he says, in that it does not depend upon a case or controversy for power to get evidence. Here, the Commission was not modifying the court of appeals' decree, but was following it up under its own law-enforcing powers, he says; it was not usurping judicial authority.

As for the alleged violation of the Administrative Procedure Act, he notes that the Commission had complied with that Act by publishing the rule upon which its order rested in the Federal Register, and therefore, unless the order is *ultra vires*, the second objection of the companies is vain, he declares.

He says that there is nothing in the history of the Federal Trade Commission Act to prevent the Commission from requiring "special reports", authorized by Section 6 of the Act, to check on compliance with Section 5 orders, the section under which the original cease and desist order was issued. Reading the Act as a whole, he determines that the Commission was acting within its authority under the statute.

As for the contentions of unconstitutionality, he say that a corporation does not have equality with individuals in the enjoyment of the right to privacy. If an agency investigates a corporation and its inquiry is not beyond its authority, its demands are not too indefinite and the information it seeks is reasonably relevant, nothing in the Constitution prevents the investigation, he declares. Nothing in the Commission's order in question transgresses those bounds, he says. The Court is not to be understood as holding that orders such as this are exempt from judicial examination, Mr. Justice JACKSON concludes, but there is nothing here to indicate an arbitrary or unlawful use of power.

Mr. Justice DOUGLAS and Mr. Justice MINTON took no part in the consideration or decision of the cases.

The cases were argued by Philip Elman for the United States, by L. M. McBride for the Morton Salt Company, and by Frederic R. Sanborn for the International Salt Company.

INSURANCE

Beneficiaries Named in National Service Life Insurance Policy Are Entitled to Proceeds of Policy as Against Wife of Insured Who Claims Under California Community Property Law

■ *Wissner* v. *Wissner*, 338 U. S. 655, 94 L. ed. Adv. Ops. 332, 70 S. Ct. 398, 18 U. S. Law Week 4118. (No. 119, decided February 6, 1950.)

This case dealt with the question whether the proceeds of a National Service Life Insurance Policy were to be paid to the mother of the insured, designated as beneficiary in the policy, or to his widow, who claimed one half under the California community property law. The California trial court determined that the insured and his wife were domiciled in California and that the premiums on the policy were paid from the insured's army pay, held to be community property under California law, and awarded the widow one half the payments already made to the mother and required the mother to pay to the widow one half of all future payments "immediately" upon receipt thereof. The District Court of Appeals affirmed, holding that the widow had a vested right to the insurance proceeds. The California Supreme Court denied a hearing.

Speaking for the Supreme Court, Mr. Justice CLARK reversed. He declares, "We do not share appellee's discovery of congressional purpose that widows in community property states participate in the payments under the policy, contrary to the express direction of the insured. Whether directed at the very money received from the Government or an equivalent amount, the judgment below nullifies the soldier's choice and frustrates the deliberate purpose of Congress." He cites the language of the National Service Life Insurance Act to the effect that the insured "shall have the right to designate the beneficiary or beneficiaries of the insurance". As for the diversion to the widow of future payments as soon as they are paid to the mother, he says that this is in "flat conflict with the exemption provisions contained in 38 U. S. C. § 454a, made a part of this Act by 38 U. S. C. § 18: Payments to a named beneficiary 'shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . .'" He dismisses the widow's Fifth Amendment argument by noting that the Act provides that "No person shall have a vested right" to the proceeds; since no vested right to the proceeds could have been in the widow, he says, no question of due process arises.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice MINTON wrote a dissenting opinion in which Mr. Justice FRANKFURTER and Mr. Justice JACKSON concurred. The judgment below does not interfere with the serviceman's right to name the beneficiary, he says. The widow however, he continues, is not claiming as beneficiary but as owner of half the premiums, and thus, under California law, of half the proceeds. No attachment, levy or seizure is attempted here, he declares, for those words are words

of art and have a definite meaning in law and as used in the Act and that meaning does not embrace what was done here. Certainly Congress did not intend to upset the long-standing community property law of the states, he says.

The case was argued by Carlos J. Badger for the appellant, and by Leslie A. Cleary for the appellee.

MINES AND MINERALS

Regulation of Secretary of Interior Directing That No Lease Be Granted Except Where Additional Coal Mine Is Needed Confers No Contract Right on Holders of Existing Leases and Does Not Apply Where Proposed Lease Is for Mere Extension of Mine Already in Existence on State Land

■ *Chapman* v. *Sheridan-Wyoming Coal Company, Inc.*, 338 U. S. 621, 94 L. ed. Adv. Ops. 307, 70 S. Ct. 392, 18 U. S. Law Week 4125. (No. 60, decided February 6, 1950.)

In this case, the Sheridan-Wyoming Coal Company, Inc., a lessee of coal mining rights in public lands, sought to prevent the Secretary of the Interior from leasing to a competitor similar rights in other public lands. Sheridan-Wyoming relies upon a 1934 regulation of the Secretary that the Court assumed fixed a controlling policy that directed that new leasing units be authorized upon a "satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met". Sheridan-Wyoming alleged that the Secretary proposed to issue a lease to the Big Horn Company, which had mines on partially-exhausted state-owned lands and desired federal lands to prolong its business, but that the Secretary had made no finding that there was a need for an additional supply of coal, and that in fact there was no such need. Sheridan-Wyoming contended that issuance of the lease would substantially impair its investment, decrease its volume of sales and cost it profitable markets. The District Court dismissed Sheridan-Wyoming's complaint on several grounds, and the Court of Appeals affirmed, with leave to apply to the District Court to amend only upon the ground that the complaint showed no standing to sue in Sheridan-Wyoming, there being no allegation of special property right in the plaintiff. The District Court denied the privilege of amending, saying that the new matter added nothing material. The Court of Appeals reversed, holding in substance that the proposed amended complaint stated a cause of action.

Speaking for the Supreme Court, Mr. Justice JACKSON reversed. There is nothing in the Mineral Leasing Acts that prevents the Secretary from taking into consideration whether a public interest will be served or injured by opening a particular mine, he says, but there is no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.

As for the charge that the Secretary would be violating his own order, he accepts the Secretary's interpretation that the order only prevents a lease that will introduce a new competitor and not one that would merely enable an existing mine and established business to continue.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Roger P. Marquis for the Secretary, and by T. Peter Ansberry for the Sheridan-Wyoming Coal Company, Inc.

RADIO COMMUNICATION

Refusal of Federal Communications Commission To Renew Broadcasting License Unless Station Repudiates Contract Does Not Render Contract Unenforceable in State Court

■ *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, 94 L. ed. Adv. Ops. 320, 70 S. Ct. 370, 18 U. S. Law Week 4140. (No. 83, decided February 6, 1950.)

Petitioner owned a radio broadcasting station. In 1930, it entered into a contract with the Southern Broadcasting Company for the operation of the station by Southern for a ten-year period. In 1940, the contract was renewed. Upon application for renewal of its license, the Federal Communications Commission denied the application on the ground that petitioner's contract with Southern violated the Commission's rule that a licensee must be responsible for control and operation of the station, and that a licensee may not transfer to any person its responsibility without the Commission's written consent. Petitioner then entered into the contract with Southern that is at issue in this case. It provided for transfer of all the stock of Southern to petitioner in return for 15 per cent of the monthly net billings of the station, an amount found by the Commission to be about 70 per cent of the station's net earnings. The Commission again denied the license application on the ground that the contract would endanger petitioner's financial ability to operate the station in the public interest, but allowed the petitioner to make a new application provided it should affirmatively show "that no further effect is given to the agreements." In 1945, petitioner repudiated the contract and on March 7, 1946, the Commission issued to petitioner the requested license. The shareholders of Southern were sustained by the Georgia courts in their suit for an accounting under the contract, the state courts holding that the Federal Communications Commission was without jurisdiction to nullify the contract, and that its denial of the license did not make the contract impossible of performance.

The Supreme Court affirmed in an opinion written by Mr. Justice REED. He dismisses the question of impossibility of performance, saying that that is a question of state law. In holding that nothing in the Communications Act of 1934 gave the Commission power to affect the contractual rights of the parties, he notes that the only sanction the Commission can apply to enforce its decisions is to revoke or to refuse to renew a license. The Act does not empower the Commission to adjudicate the contractual liability of a licensee for its contracts, he says. The

Commission did not, as it has done in other cases, obtain an assent to cancellation of the contract, and the dilemma in which the Commission finds itself is the "inevitable result of the statutory scheme of licensing", he declares. There is no violation of the supremacy clause of the Constitution, he says.

Mr. Justice BLACK and Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Hamilton Lokey for the petitioner, and by James A. Branch for Carroll.

SEARCHES AND SEIZURES

Search Without Search Warrant of Office of Suspect Upheld Where Incident to Valid Arrest Though There Had Been Ample Time To Obtain Search Warrant

■ *United States* v. *Rabinowitz*, 339 U. S. 56, 94 L. ed. Adv. Ops. 407, 70 S. Ct. 430, 18 U. S. Law Week 4157. (No. 293, decided February 20, 1950.)

Rabinowitz was convicted of selling and possessing and concealing forged and altered United States obligations with intent to defraud. He was arrested by officers armed with a warrant of arrest but not with a search warrant. Evidence obtained by a search of his one-room office at the time of the arrest was admitted at the trial over his objections. Relying upon *Trupiano* v. *United States*, 334 U. S. 669, the Court of Appeals for the Second Circuit reversed the conviction on the ground that the search of the office was illegal since the officers had had time to obtain a search warrant and had not done so.

The Supreme Court reversed, speaking through Mr. Justice MINTON. He says that the language of the Fourth Amendment prohibits *unreasonable* searches but that no one questions the right to search the person after a valid arrest, for this is not unreasonable. Previous decisions of the Court have recognized that there is a permissible area of search beyond the person proper, he notes. "It became accepted" he says "that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant." Because the search here was reasonable under this doctrine, the officers were not bound to obtain a search warrant although they had time to do so, he declares. "To the extent that *Trupiano* v. *United States* . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled" he announces.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Joined by Mr. Justice JACKSON, Mr. Justice FRANKFURTER wrote a dissenting opinion. The basic roots of the exception to the prohibition of the Fourth Amendment of search without a warrant in the case of legal arrest lie in necessity, he says. The search is permitted to protect the arresting officer and to deprive the prisoner of potential means of escape. He proceeds to discuss at length the cases cited by the majority, saying that they do not support the decision. They show, he says, "how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision". The right to search the place of arrest without a warrant, he declares, is an innovation "based on confusion, without historic precedent, and made in the teeth of a historic protection against it".

Mr. Justice BLACK wrote a dissenting opinion in which he states: "Whether this Court should adhere to the *Trupiano* principle making evidence so obtained inadmissible in federal courts now presents no more than a question of what is wise judicial policy." Nevertheless he thinks that overruling the *Trupiano* case merely aggravates existing uncertainty.

The case was argued by Philip B. Perlman for the United States, and by Abraham Lillienthal for Rabinowitz.

TAXATION

New Jersey Statute Assessing Intangibles of Insurance Companies, Which Included Federal Bonds Exempt from State Taxation, Held Invalid

■ *New Jersey Realty Title Insurance Company* v. *Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey*, 338 U. S. 665, 94 L. ed. Adv. Ops. 337, 70 S. Ct. 413, 18 U. S. Law Week 4121. (No. 147, decided February 6, 1950.)

A New Jersey statute imposes a tax on stock insurance companies doing business in the state. The tax is assessed upon the full amount or value of their intangible personal property, exclusive of shares of stock owned by the companies and of nontaxable property and property exempt from taxation. The statute also provides that "the assessment against the intangible personal property . . . shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities. . . ." In computing appellant's tax under this statute, the state tax division did not dispute that appellant's total intangible assets included U. S. Treasury bonds with a face value of $450,000 and that its other nontaxable and exempt property had a value of $318,771.95. Under the formula provided in the statute, it was found that appellant had no balance of assessable property subject to tax, and the division accordingly levied the tax under the proviso that the assessment should not be less than 15 per cent of the corporate net worth. The tax was upheld by the New Jersey Supreme Court. In the United States Supreme Court, appellant challenges the validity of the assessment on the ground that it levied a tax upon interest-bearing obligations of the United States that are exempted from state taxation by 31 U.S.C. § 742.

The Supreme Court's opinion reversing was delivered by Mr. Justice CLARK, who says that, while the New Jersey court declared that the federal securities involved were "exempt from state, municipal, or local taxa-

of art and have a definite meaning in law and as used in the Act and that meaning does not embrace what was done here. Certainly Congress did not intend to upset the long-standing community property law of the states, he says.

The case was argued by Carlos J. Badger for the appellant, and by Leslie A. Cleary for the appellee.

MINES AND MINERALS

Regulation of Secretary of Interior Directing That No Lease Be Granted Except Where Additional Coal Mine Is Needed Confers No Contract Right on Holders of Existing Leases and Does Not Apply Where Proposed Lease Is for Mere Extension of Mine Already in Existence on State Land

■ *Chapman* v. *Sheridan-Wyoming Coal Company, Inc.*, 338 U. S. 621, 94 L. ed. Adv. Ops. 307, 70 S. Ct. 392, 18 U. S. Law Week 4125. (No. 60, decided February 6, 1950.)

In this case, the Sheridan-Wyoming Coal Company, Inc., a lessee of coal mining rights in public lands, sought to prevent the Secretary of the Interior from leasing to a competitor similar rights in other public lands. Sheridan-Wyoming relies upon a 1934 regulation of the Secretary that the Court assumed fixed a controlling policy that directed that new leasing units be authorized upon a "satisfactory showing that an additional coal mine is needed and that there is an actual need for coal which cannot otherwise be reasonably met". Sheridan-Wyoming alleged that the Secretary proposed to issue a lease to the Big Horn Company, which had mines on partially-exhausted state-owned lands and desired federal lands to prolong its business, but that the Secretary had made no finding that there was a need for an additional supply of coal, and that in fact there was no such need. Sheridan-Wyoming contended that issuance of the lease would substantially impair its investment, decrease its volume of sales and cost it profitable markets. The District Court dismissed Sheridan-Wyoming's complaint on several grounds, and the Court of Appeals affirmed, with leave to apply to the District Court to amend only upon the ground that the complaint showed no standing to sue in Sheridan-Wyoming, there being no allegation of special property right in the plaintiff. The District Court denied the privilege of amending, saying that the new matter added nothing material. The Court of Appeals reversed, holding in substance that the proposed amended complaint stated a cause of action.

Speaking for the Supreme Court, Mr. Justice JACKSON reversed. There is nothing in the Mineral Leasing Acts that prevents the Secretary from taking into consideration whether a public interest will be served or injured by opening a particular mine, he says, but there is no grant of authority to create a private contract right that would override his continuing duty to be governed by the public interest in deciding to lease or withhold leases.

As for the charge that the Secretary would be violating his own order, he accepts the Secretary's interpretation that the order only prevents a lease that will introduce a new competitor and not one that would merely enable an existing mine and established business to continue.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Roger P. Marquis for the Secretary, and by T. Peter Ansberry for the Sheridan-Wyoming Coal Company, Inc.

RADIO COMMUNICATION

Refusal of Federal Communications Commission To Renew Broadcasting License Unless Station Repudiates Contract Does Not Render Contract Unenforceable in State Court

■ *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, 94 L. ed. Adv. Ops. 320, 70 S. Ct. 370, 18 U. S. Law Week 4140. (No. 83, decided February 6, 1950.)

Petitioner owned a radio broadcasting station. In 1930, it entered into a contract with the Southern Broadcasting Company for the operation of the station by Southern for a ten-year period. In 1940, the contract was renewed. Upon application for renewal of its license, the Federal Communications Commission denied the application on the ground that petitioner's contract with Southern violated the Commission's rule that a licensee must be responsible for control and operation of the station, and that a licensee may not transfer to any person its responsibility without the Commission's written consent. Petitioner then entered into the contract with Southern that is at issue in this case. It provided for transfer of all the stock of Southern to petitioner in return for 15 per cent of the monthly net billings of the station, an amount found by the Commission to be about 70 per cent of the station's net earnings. The Commission again denied the license application on the ground that the contract would endanger petitioner's financial ability to operate the station in the public interest, but allowed the petitioner to make a new application provided it should affirmatively show "that no further effect is given to the agreements." In 1945, petitioner repudiated the contract and on March 7, 1946, the Commission issued to petitioner the requested license. The shareholders of Southern were sustained by the Georgia courts in their suit for an accounting under the contract, the state courts holding that the Federal Communications Commission was without jurisdiction to nullify the contract, and that its denial of the license did not make the contract impossible of performance.

The Supreme Court affirmed in an opinion written by Mr. Justice REED. He dismisses the question of impossibility of performance, saying that that is a question of state law. In holding that nothing in the Communications Act of 1934 gave the Commission power to affect the contractual rights of the parties, he notes that the only sanction the Commission can apply to enforce its decisions is to revoke or to refuse to renew a license. The Act does not empower the Commission to adjudicate the contractual liability of a licensee for its contracts, he says. The

Commission did not, as it has done in other cases, obtain an assent to cancellation of the contract, and the dilemma in which the Commission finds itself is the "inevitable result of the statutory scheme of licensing", he declares. There is no violation of the supremacy clause of the Constitution, he says.

Mr. Justice BLACK and Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Hamilton Lokey for the petitioner, and by James A. Branch for Carroll.

SEARCHES AND SEIZURES

Search Without Search Warrant of Office of Suspect Upheld Where Incident to Valid Arrest Though There Had Been Ample Time To Obtain Search Warrant

■ *United States* v. *Rabinowitz,* 339 U. S. 56, 94 L. ed. Adv. Ops. 407, 70 S. Ct. 430, 18 U. S. Law Week 4157. (No. 293, decided February 20, 1950.)

Rabinowitz was convicted of selling and possessing and concealing forged and altered United States obligations with intent to defraud. He was arrested by officers armed with a warrant of arrest but not with a search warrant. Evidence obtained by a search of his one-room office at the time of the arrest was admitted at the trial over his objections. Relying upon *Trupiano* v. *United States,* 334 U. S. 669, the Court of Appeals for the Second Circuit reversed the conviction on the ground that the search of the office was illegal since the officers had had time to obtain a search warrant and had not done so.

The Supreme Court reversed, speaking through Mr. Justice MINTON. He says that the language of the Fourth Amendment prohibits *unreasonable* searches but that no one questions the right to search the person after a valid arrest, for this is not unreasonable. Previous decisions of the Court have recognized that there is a permissible area of search beyond the person proper, he notes. "It became accepted" he says "that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant." Because the search here was reasonable under this doctrine, the officers were not bound to obtain a search warrant although they had time to do so, he declares. "To the extent that *Trupiano* v. *United States* . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled" he announces.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Joined by Mr. Justice JACKSON, Mr. Justice FRANKFURTER wrote a dissenting opinion. The basic roots of the exception to the prohibition of the Fourth Amendment of search without a warrant in the case of legal arrest lie in necessity, he says. The search is permitted to protect the arresting officer and to deprive the prisoner of potential means of escape. He proceeds to discuss at length the cases cited by the majority, saying that they do not support the decision. They show, he says, "how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision". The right to search the place of arrest without a warrant, he declares, is an innovation "based on confusion, without historic precedent, and made in the teeth of a historic protection against it".

Mr. Justice BLACK wrote a dissenting opinion in which he states: "Whether this Court should adhere to the *Trupiano* principle making evidence so obtained inadmissible in federal courts now presents no more than a question of what is wise judicial policy." Nevertheless he thinks that overruling the *Trupiano* case merely aggravates existing uncertainty.

The case was argued by Philip B. Perlman for the United States, and by Abraham Lillienthal for Rabinowitz.

TAXATION

New Jersey Statute Assessing Intangibles of Insurance Companies, Which Included Federal Bonds Exempt from State Taxation, Held Invalid

■ *New Jersey Realty Title Insurance Company* v. *Division of Tax Appeals in the Department of Taxation and Finance of the State of New Jersey,* 338 U. S. 665, 94 L. ed. Adv. Ops. 337, 70 S. Ct. 413, 18 U. S. Law Week 4121. (No. 147, decided February 6, 1950.)

A New Jersey statute imposes a tax on stock insurance companies doing business in the state. The tax is assessed upon the full amount or value of their intangible personal property, exclusive of shares of stock owned by the companies and of nontaxable property and property exempt from taxation. The statute also provides that "the assessment against the intangible personal property . . . shall in no event be less than fifteen per centum of the sum of the paid-up capital and the surplus in excess of the total of all liabilities. . . ." In computing appellant's tax under this statute, the state tax division did not dispute that appellant's total intangible assets included U. S. Treasury bonds with a face value of $450,000 and that its other nontaxable and exempt property had a value of $318,771.95. Under the formula provided in the statute, it was found that appellant had no balance of assessable property subject to tax, and the division accordingly levied the tax under the proviso that the assessment should not be less than 15 per cent of the corporate net worth. The tax was upheld by the New Jersey Supreme Court. In the United States Supreme Court, appellant challenges the validity of the assessment on the ground that it levied a tax upon interest-bearing obligations of the United States that are exempted from state taxation by 31 U.S.C. § 742.

The Supreme Court's opinion reversing was delivered by Mr. Justice CLARK, who says that, while the New Jersey court declared that the federal securities involved were "exempt from state, municipal, or local taxa-

tion", it is clear that in the computation of the assessment, the face value of appellant's government bonds was included. This is a violation of the federal bond exemption, he says, and it does not matter whether the tax is an indirect levy upon net worth measured by corporate capital and surplus or a tax upon personal property based on a valuation gauged by capital and surplus. "Our inquiry is narrowed to whether in practical operation and effect the tax is in part a tax upon federal bonds" he says.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice BLACK wrote a dissenting opinion in which he says that it is well settled that a state may levy a tax upon a "legitimate subject, such as a franchise, measured by net assets or net income including tax-exempt federal instrumentalities". If the statute had set a minimum tax in dollars, it would not be held unreasonable, he says, and the fact that the minimum tax actually enacted varies fairly with the net worth and that appellant happens to own government bonds should not require the court to strike it down as unconstitutional. Appellant concedes that its net worth exceeds the value of its tax-exempt federal securities, he declares, so the tax imposed did not touch the bonds.

The case was argued by Walter Gordon Merritt for the appellant, and by Vincent J. Casale for the appellee.

Law and the Laymen

■ [At the Annual Meeting of the Association in St. Louis last autumn, Winston Paul, Chairman of the Committee on Constitutional Revision of New Jersey, delivered an address entitled "Achieving a New Judical System". We are indebted to Judge Bolitha J. Laws, Chief Judge of the United States District Court for the District of Columbia, for the following digest of Mr. Paul's remarks.]

Nowhere does government touch the life of a people more intimately than in the administration of justice. For this reason, our judicial system must keep pace with modern trends in society, business and science to the end that the public never becomes dissatisfied with the processes of justice. The use of more and more administrative commissions and the ever-increasing use of arbitration agreements in contracts are indications that the courts have proved inadequate in their rôle of determining the rights of adverse parties. Need for improvements in our judicial system has long been apparent to the Bench, the Bar and the public. Only to a limited extent, however, have the Bench and the Bar recognized that lay interest and organizing talents are necessary to obtain the objective of an improved judicial system. The inertia, sometimes even opposition from the Bar and the Bench, will often require that laymen, because of their independent position, become the catalytic agents of judicial reform. In determining the characteristics desired in an improved judicial system, the Bench and the Bar should take the initiative. Once the objectives have been established the question always arises, how can they be attained?

The first step is to invite into the preliminary meetings, even for the discussion of objectives, a group of outstanding lay civic leaders. They must be made to feel that they have a part in determining the program and must be familiarized with the reasons for the proposed improvements. As laymen, they may well know where the courts fail to meet the needs of the citizen, especially the local police and traffic courts, which are too often integral parts of the political rather than the judicial system. Also, little argument will be required to convince businessmen of the value of responsible and effective administrative supervision of the judicial system. Lay interests will also prove valuable in improving the method of selection of jurors.

Care and thought must be exercised in the selection of these civic leaders to ensure that they consist of people who have a sincere civic spirit. The organizing group should be selected on a bipartisan basis and care should be taken to include representatives of as many business and civic groups as possible, including farm, labor and women's organizations. From this organizing group, a competent leader, well-versed in political affairs and with the qualities of persistence and determniation should be selected for the direction of the campaign. In addition to shrewd direction and outstanding leadership, public support will be of inestimable value. It is necessary to secure sponsorship of the movement by one or more "front men" whose integrity and public standing are such that their support will be generally recognized as sincere and informed, and who can command newspaper space.

The three important elements for success are as follows:

1. Nonlegal sponsoring group.
2. An experienced director, if possible professional.
3. Adequate financing based on a carefully prepared budget.

The campaign for public support will require the enlisting of speakers for whom a handbook, printed or mimeographed, should be prepared; arranging for numerous public and group meetings of service clubs, churches and schools; and the distribution of literature, illustrated, if possible, with cartoons. Dissemination of information on the present court system and the reasons for improvement are of primary impor-

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Courts, Departments and Agencies

E. J. Dimock • **EDITOR-IN-CHARGE** **Lydia A. G. Stratton** • **ASSISTANT**

Constitutional Law . . . due process and equal protection . . . provisions of California Alien Land Law that escheat land to state when conveyed to Japanese held unconstitutional.

■ *Masaoka et al.* v. *People of the State of California,* Calif. Superior Ct., Los Angeles County, March 16, 1950, Clarke, J.

In a memorandum opinion in an action to quiet title, the Court held California's Alien Land Law unconstitutional on the grounds that it was directed against persons of Japanese ancestry solely because of race and was in direct violation of the due process and equal protection clauses of the Fourteenth Amendment. The opinion was rendered in the case of five American war veterans of Japanese ancestry who, precluded by the escheat provisions of Alien Land Law from making a gift of a home to their Japanese alien mother who had lived in the United States since 1905, brought an action against the state to quiet title to the land. The Court found that the law impaired the constitutionally protected right to acquire, own and enjoy real property.

Contempt . . . obstruction of justice . . . the picketing of a judge's home and the writing of insulting and threatening letters to him in disapproval of his decision in pending matters constitute a clear and present danger to the orderly administration of justice and are punishable as contempt.

■ *Fawick Airflex Co., Inc.* v. *United Electrical, Radio & Machine Workers of America, Local 735, et al.,* Ohio Ct. App., March 6, 1950, Hunsicker, J.

The Court held in this action that the picketing of a judge's home and the writing of insulting and threatening letters to him to express disapproval of his decision in matters pending before him constituted a clear and present danger to the orderly administration of justice and were punishable by such judge as contempt of court. He was criticized for convicting certain strikers of violating an injunction. The cases of other strikers were still undisposed of. In applying the clear and present danger rule with respect to contempt convictions as enunciated by the United States Supreme Court in *Bridges* v. *State of California,* 314 U. S. 252, and *Pennekamp* v. *State of Florida,* 328 U. S. 331, the Court stated that judicial decorum and dignity "are lowered to the caterwauling of the ill-mannered and depraved" if a judge is to have hovering over him the possibility that harm or disorder are to be a constant threat to his home and family whenever those that disagree with him decide to picket his residence, however short the duration of such picketing or however peaceful it becomes in the presence of police officers. With regard to the letters charging undue influence and corruption and threatening the judge personally, the Court ruled that any language by which it is intended to influence the action of a judge, or language that has a tendency to influence him, is a danger to the impartial administration of justice and, hence, not to be protected by the right of free speech guaranteed by the First and Fourteenth Amendments. The Court found the conviction improper, however, in the case of one disapproving letter that, although written in bad taste, was not deemed to constitute a threat to the judicial process.

Contempt . . . attorneys . . . summary punishment imposed upon attorneys for criminal contempt committed while defending Communists during nine-month trial in federal district court was not invalidated by court's withholding of contempt citation until end of trial or by its finding that attorneys' conduct was result of conspiracy, which could not have been entered into in the court's presence.

■ *U. S.* v. *Sacher et al.,* C.A. 2d, April 5, 1950, A. N. Hand, C.J.

By a two-to-one vote, the Court of Appeals upheld the sentences for criminal contempts of court summarily imposed upon appellants for conduct while acting as defense attorneys (one as attorney *pro se*) for the eleven Communists convicted of violating the Smith Act (see 35 A.B.A.J. 850, 1022, October, December, 1949). Sentenced at the close of the nine-month trial, the attorneys were given prison terms ranging from thirty days to six months. They were convicted under Rule 42 of the Federal Rules of Criminal Procedure authorizing summary punishment—without a trial—of contemptuous conduct that the judge "saw or heard" and that was "committed in the actual presence of the court". The decision upheld all the contempt specifications with the exception of three in the case of appellant Sacher and one each for the remaining five appellants. The specification reversed as to all the attorneys was one charging that they "joined in a wilful, deliberate and concerted ef-

EDITOR'S NOTE: The omission of a citation to the United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

fort to delay and obstruct" the trial. Appellants contended that such a finding of an agreement on their part precluded the imposition of summary punishment since the conduct punished could not have been committed in the court's presence. A. N. Hand, C.J., writing the majority opinion, took the position for himself alone that the district judge's finding of an agreement meant no more than that appellant's contumacious acts committed in his presence were "deliberate"; any belief on his part as to the existence of a prior conspiracy was considered "quite unimportant" and not a limitation on his power to impose summary punishment on the agreement specification. Frank, C.J., differed from Judge Hand as to the validity of the sentence on the agreement specification and, since Clark, C.J., voted to reverse the sentences on all the specifications, the decision of a majority of the Court was to reverse the sentence on the agreement specification. Frank, C.J., maintained that this specification charged "something in the nature of a conspiracy" which could not be presumed to have been made in the judge's presence and thus required a hearing to afford appellants the opportunity to offer evidence that they had not entered into a conspiracy. The reversal as to this specification, however, the majority agreed, had "no practical effect" since the question of conspiracy was deemed "wholly irrelevant" to the remaining specifications, which were separate and distinct and supported by the record.

The majority also ruled that the imposition of summary punisment was not vitiated by the fact that the contempt citations were withheld until the end of the trial. Noting that the United States Supreme Court had left open the question whether a judge empowered to punish a contempt in open court without notice and hearing must impose sentence immediately after the contempt is committed, the Court held that the degree of promptitude required depended upon the particular facts of each case and that the punishment need not follow immediately if such an imposition would endanger the defense in a criminal case or interfere with its conduct.

Clark, C.J., dissenting, conceded that this was an "unusual case presenting unusual situations" but would order the proceedings remanded for a hearing upon the charges in the contempt certificate. It was his view that, although appellants' conduct appeared at times to be "abominable", nevertheless the "right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority' ".

Corporations . . . stockholders' derivative actions . . . action brought in federal district court alleging that the transaction giving rise to suit violated the Transportation Act of 1940 sets forth a substantial claim under a federal statute, and hence is not subject as a nondiversity case to the New York statute requiring that the dissenting stockholders furnish security for costs.

■ *Fielding* v. *Allen et al.*, C. A. 2d, April 12, 1950, Swan, C. J.

The questions presented on appeal were whether the second count of the complaint in the instant stockholder's derivative action brought in the United States District Court for the Southern District of New York to set aside a sale of corporate assets and to obtain an accounting from the corporation's officers and directors was founded on a federal statute and, if so, whether § 61-b of the New York General Corporation Law requiring stockholders in derivative actions to furnish security for costs as a condition precedent to the prosecution of such actions was applicable. In addition to invoking federal jurisdiction on the basis of diversity of citizenship, the count alleged that the sale of defendant Ogden Corporation's railroad stock through an intermediary to a company already in control of another railroad company was a violation of both the Transportation Act of 1940 and § 5 (4) of the Interstate Commerce Act which makes it unlawful for any person to cause the control of two or more carriers to be united in a common interest; the complaint claimed that the Commission's approval of this transfer was fraudently obtained by the suppression of material facts and was void. The lower court held in regard to this count that federal jurisdiction was founded on diverse citizenship exclusively since the violation of the Transportation Act was "but an incident to the wrongful acts alleged to have been committed"; accordingly, the action was ordered dismissed unless plaintiffs furnished security pursuant to the New York statute.

Reversing the order below, the Court ruled on appeal that the security requirements of the state statute were inapplicable since, despite the jurisdictional allegation of diversity of citizenship, the complaint was deemed to set forth a claim (even if not a cause of action) under a federal statute sufficient to bring the case within the jurisdiction of a federal court. The Court further held that the right of a stockholder to maintain a derivative action on a corporate right federal in nature was federally conferred and therefore not subject to special requirements for similar actions under state law. Referring to the policy enunciated in *Payne* v. *Hook*, 7 Wall. 425, the Court maintained that the federal courts were free of state remedial law in nondiversity cases falling within the domain of federal equity jurisprudence. The Court concluded, therefore, that the ruling of the United States Supreme Court in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541 (34 A.B.A.J. 1049, November, 1948; 35 A.B.A.J. 335, 679, April, August, 1949), that a New Jersey statute requiring stockholders in derivative suits to post security for the corporation's reasonable litigation expenses was binding upon a federal district court in a diversity action, was not controlling in the instant nondiversity action based on a federal statute. The Court conceded, however, that the question was not free from doubt in view of the statement in the *Cohen* case that such a

state statute creating a "new liability" on the part of plaintiff stockholders could not be "disregarded by the federal courts as a mere procedural device".

Evidence . . . privileged communications . . . attorney-client privilege may not be invoked to bar admission in evidence of statements made by lawyer to judge to whom he had gone for advice regarding charge of his participation in election frauds and who, at time of consultation, had already convened and was about to charge grand jury investigating the election irregularities.

■ *Prichard* v. *U. S.*, C. A. 6th, April 4, 1950, Simons, C. J.

Appellant lawyer, who had been indicted and convicted under 18 USC § 241 for conspiring to stuff ballot boxes in certain precincts of Bourbon County, Kentucky, during a national election, appealed on the principal ground that the District Court erred in admitting in evidence, over his claim of privilege, the testimony of one Judge Ardery whom he had consulted for advice regarding the charge that he had participated in the election frauds. At the time of appellant's consultation with Judge Ardery, who was the presiding circuit judge of Bourbon County, a grand jury had already been impaneled by him to investigate the election irregularities and was scheduled the following morning to receive his instructions as to their duties and the scope of the investigation. The judge testified, *inter alia*, that he felt he could advise appellant and then withdraw from any case that might result from the grand jury investigation.

Describing the case as one *sui generis*, the Court affirmed the judgment below and ruled that appellant's admissions to the judge were not privileged as confidential communications between an attorney and client since it was "morally, if not legally, impossible" for the judge to enter into such a relationship with one whose conduct was about to be investigated by a grand jury already called and about to be instructed. This, the Court emphasized, appellant "knew or must have known" as a lawyer, and hence there was a lack of good faith, as well as a disregard for accepted notions of judicial propriety, in his request for advice. To allow the privilege under such circumstances, it was stated, would invite frustration of the administration of the courts by their judges, would be inimical to the public interest and a perversion of the attorney-client privilege. In ruling that the judge consulted in this case was "not merely a judge giving, as a lawyer, legal advice to a client", the Court did not consider itself confined to the narrow limits of the Kentucky statute prohibiting a circuit judge from practicing law "in any court of the state. . .", which was subject to the possible construction that such a prohibition did not disqualify a judge from giving legal advice outside the courtroom. Without deciding whether judges of superior courts may ever enter into an attorney-client relationship, the Court referred to the statement in Canon 31 of Judicial Ethics promulgated by the American Bar Association that the practice of law by judges in superior courts of general jurisdiction should never be permitted.

The Court rejected a further contention that, since the result of the election was not affected by the frauds, the Government's charges and proofs failed to establish a federal offense under § 241, stating that to the extent that an elector's vote is nullified by a dishonest count he has been injured in the "free exercise or enjoyment of a right or privilege secured to him by the Constitution or laws of the United States" within the meaning of that section.

Federal Trade Commission . . . two major cigarette manufacturers are ordered to cease and desist from falsely advertising the superiority of their brands as to nicotine content and throat-irritating properties over other leading cigarette brands.

■ *In re R. J. Reynolds Tobacco Co.*, Doc. No. 4795, Federal Trade Commission, March 31, 1950.

■ *In re P. Lorillard Co.*, Doc. No. 4922, Federal Trade Commission, March 31, 1950.

On the basis of findings that all cigarettes contained varying amounts of nicotine and throat irritants and that there was no reliable basis in fact for advertising claims that one brand of cigarettes was superior to another in these respects, the FTC issued cease and desist orders prohibiting false and misleading advertising of Camels and Old Gold cigarettes and other tobacco products. In ruling that the makers of the two cigarette brands in question could not truthfully claim a lower nicotine content, the Commission pointed out that the tobacco used by the manufacturers of all leading brands contained nicotine in substantially the same quantities and variations, and that the smoke from all leading brands contained throat irritants, such as tars and resins, in essentially the same quantities and degree. Nicotine content was found to vary greatly not only as among the six largest selling brands but also as among individual cigarettes of the same brand.

Specifically, the Reynolds Tobacco Company was prohibited from claiming that smoking Camels aids digestion in any respect, relieves fatigue or renews bodily energy, soothes or comforts the nerves, does not affect or impair the "wind" or physical condition of athletes, never leaves an after-taste, or that its cigarettes contain less nicotine than do those of its four principal competitors. In addition, advertisements claiming that Camels were either beneficial to, or not injurious to, a particular bodily system or some part of the body were found to be deceptive because of their general nature and because they were directed to all persons irrespective of their physical condition. Contrary to these representations, the Commission stated, the record clearly showed that cigarettes, including Camels, were physiologically injurious when smoked to excess or where the smoker was diseased, and that the only physiological effect that smoking could have upon digestion, if it had any at all, was harmful.

In connection with Old Gold advertising, the Lorillard Company was forbidden to represent that Old Golds contained less nicotine, tars or resins, or were less irritating to the throat than any other leading brand. The order was also directed against deceptive claims as to the beneficial properties of Beach-Nut cigarettes and "rum-cured" Friends smoking tobacco.

(A proposed order recommended in the case of the American Tobacco Company is directed, *inter alia,* against claims that independent tobacco experts prefer Luckies "2 to 1", and that the "toasting" process removes irritants and impurities to a physiologically significant degree.)

Libel and Slander . . . damages . . . California statute permitting newspapers or radio stations to avoid payment of any but special damages in a libel suit by publishing a retraction held constitutional.

■ *Werner* v. *Southern California Associated Newspapers,* Calif. Supreme Ct., April 14, 1950, Traynor, J. (Digested in 18 U. S. Law Week 2481, April 25, 1950).

By a five-to-two vote, the Court in this case upheld the constitutionality of §48 (a) of the California Civil Code which permits newspapers or radio stations to avoid payment of any but special damages in a libel suit by publishing or broadcasting a retraction. The Court found at least two permissible legislative objects justifying such statutory limitation of recovery to special damages, namely, the danger of excessive recoveries of damages in libel actions and the public interest in the free dissemination of news. Since the due process clause was not deemed "to forbid the creation of new rights or the abolition of old ones" to attain a proper legislative object, the Court stated that it could not be invoked to invalidate a legislative policy that might be considered unwise without exercising judicial censorship directed at the wisdom rather than the constitutionality of legislation. The Court rejected plaintiff's contention that the statute's substitution of a retraction for all but special damages was an unconstitutional attempt to relieve newspapers and radio stations from full responsibility for the abuse of the right of free speech under the declaration "being responsible for the abuse of that right" in the clause of the California constitution extending the right of free speech to the citizen. The purpose of this declaration, asserted the Court, was not to guarantee to the person defamed a right to damages, but merely to specify that the clause did not guarantee immunity from liability for libel. The Court also rejected the argument that the statute violated the equal protection clause in granting to newspapers and radio stations privileges denied to others, thus discriminating against persons defamed by newspapers or radio stations. In finding that the classification bore a reasonable relationship to the purposes of the statute, the Court noted that the legislature could properly consider the fact that a retraction by a newspaper or radio station would have greater effectiveness than a retraction by an individual, as well as the fact that the danger of excessive damages was greatest in defamation actions against newspapers or radio stations because of their reputed ability to pay.

Libel and Slander . . . political broadcasts . . . prohibition by Federal Communications Act of radio stations' censorship of political addresses by candidates for public office is not restricted to speeches made by candidates themselves but is applicable to allegedly defamatory speech broadcast by party official campaigning for party candidates.

■ *Felix* v. *Westinghouse Radio Station Inc.,* U.S.D.C., E.D. Pa., March 15, 1950, Kirkpatrick, D. J.

The question presented in this libel action was whether the provision of the Federal Communications Act prohibiting censorship by radio stations of political addresses by candidates for public office was restricted to speeches made by the candidates themselves or whether it was also applicable to a speech broadcast from a written script by a political party official authorized to campaign for the election of his party's candidates and to use defendant's broadcasting station. Licensees who permit candidates for public office "to use" a broadcasting station are required by § 315 of the Act to afford equal opportunities to all candidates and are denied any power of censorship over the material broadcast by such candidates; the section further provides that no obligation is thereby imposed upon any licensee to allow the use of its station by any such candidate. In asserting liability on the part of defendant radio station for an allegedly defamatory remark in the party official's broadcast, plaintiff contended that the word "use" rather than "speak over" or some other equivalent was adopted in § 315 only in order to cover transcriptions and rebroadcasting as well as direct speech into the microphone, and hence did not encompass speeches made by persons other than the candidates themselves.

Holding that under § 315 defendant radio station could not have censored the speech in question and was therefore without liability in the matter of the alleged defamation, the Court ruled that a candidate for public office who authorizes another to make an address in the furtherance of his campaign does thereby "use" the station within the meaning of the Act. Rejecting the narrow meaning ascribed by plaintiff to the term "use", the Court pointed out that under such an interpretation it would be perfectly feasible and legal for a broadcasting station to refuse its facilities to all the candidates, in their own persons, and then allow spokesmen for one side unlimited time to the total exclusion of all speakers on the other side. On the contrary, the Court stated, the policy of the Act required that the section be interpreted to safeguard the opportunity of the voters to hear a full and free discussion of both sides of the issues affecting their choice, and to prevent radio broadcasting sta-

tions from becoming instrumentalities controlled by any one group or party. The Court noted that under the law of Pennsylvania, as enunciated in *Summit Hotel* v. *National Broadcasting Company*, 336 Pa. 182, the principle of absolute liability, regardless of fault, did not apply to a radio broadcasting station transmitting libelous matter.

Negligence . . . party to whom duty is owed . . . mother may not recover for physical injuries caused by fright and shock of learning, immediately after its occurrence, of injury to her child due to the negligent operation of defendant's automobile.

■ *Cote* v. *Litawa*, N. H. Supreme Ct., March 7, 1950, Lampron, J. (Digested in 18 U. S. Law Week 2448, April 4, 1950).

The Court held in this case that plaintiff mother could not recover for physical injuries caused by the fright and shock of learning, immediately after its occurrence, of physical injury inflicted on her child by the negligent operation of defendant's automobile. Noting that it was not aware of any case deciding the precise issue presented, the Court stated that the injuries here were such an unusual and extraordinary result of the careless operation of an automobile that to impose a duty to avoid such results would place an unreasonable burden upon the users of the highways.

Utilities . . . Public Utility Holding Company Act . . . SEC held authorized by §§ 12 (e) and 11 (f) of the Act to prohibit a stockholders' protective committee of a holding company undergoing reorganization under the Act to solicit voluntary contributions from stockholders to pay committee fees and expenses.

■ *Halsted et al.* v. *Securities and Exchange Commission*, C. A., D. C., April 24, 1950, Washington, C. J.

This case arose upon a petition by a stockholders' protective committee to obtain SEC approval of a proposed solicitation of operating funds from stockholders in Long Island Lighting Company, a registered public utility holding company undergoing reorganization under the Public Utility Holding Company Act of 1935. The SEC denied the petition and the committee sought judicial review.

Affirming the Commission's order by a two-to-one vote, the Court deemed the order to lie within SEC jurisdiction by virtue of both §§ 12 (e) and 11 (f) of the Holding Company Act. Power to regulate solicitation of funds was found in § 12 (e), which makes it unlawful "to solicit . . . any proxy, power of attorney, consent or authorization regarding any security" of a holding company "in contravention of such rules and regulations or orders" as may be established by the Commission "for the protection of investors or consumers or to prevent the circumvention of the provisions of this chapter or the rules, regulations or orders thereunder". The Court maintained that Congress had intended by this language to give the SEC broad powers to regulate stockholder solicitations, whether or not they fell "within the ambit of any particular rule", and that obtaining funds from stockholders had been one of the abuses at which the Act was aimed. Hence, the Court ruled, the committee's proposed action in circularizing stockholders for voluntary contributions amounted to soliciting an "authorization" within the meaning of § 12 (e), and would or could produce "circumvention" of the Act or its implementation by the SEC. A further statutory grant of authority to the Commission to forbid such solicitation was found in § 11 (f), which gives the Commission control over "all fees, expenses and remuneration to whomsoever paid, in connection with any reorganization . . . in any such proceeding". Support for the majority's position was also found in *Leiman* v. *Guttman*, 336 U. S. 1 (34 A.B.A.J. 414, 1051, May, November, 1948; 35 A.B.A.J. 226, 334, March, April, 1949), in which the United States Supreme Court held a contract made with a committee by a few individual stockholders to be subject to the beneficial controls established by the Chandler Act; protection of stockholders was deemed even more necessary in the instant case where there was no such bargained contract but merely "an attempt (in effect) to solicit a like reward by mass circularization of scattered investors". The contention that the SEC's action violated the committee's right of free speech was rejected on the ground that such action was no more repugnant to the First Amendment than any similar court order in regard to the fees of a fiduciary.

Miller, C. J., dissenting, denied that the Commission's prohibitory action was authorized by either §§ 12 (e) or 11 (f) of the Act, stating that the former was limited to "authorizations" and the latter to payments out of the funds of the utility.

War . . . Trading with the Enemy Act . . . German-born resident of Hawaii stranded in Germany upon outbreak of war is not entitled to return of property vested by Alien Property Custodian since claimant, although free from "enemy taint" and not an "enemy or ally of an enemy" under § 9(a) of the Act, is a German "national" within intendment of § 39 of the Act barring return of vested property to German or Japanese nationals.

■ *Guessefeldt* v. *McGrath*, U.S.D.C., D. C., March 14, 1950, Tamm, D. J.

Plaintiff, who was German-born but had been a resident of Hawaii since 1896, brought an action under § 9 (a) of the Trading with the Enemy Act (50 USC App. §§ 1 *et seq.*) for the return of certain property in Hawaii that had been vested in the Alien Property Custodian on February 8, 1948, and May 12, 1949. Plaintiff was stranded during a trip in Germany upon the outbreak of hostilities in September, 1939, and involuntarily remained there until July, 1949, when he returned to the United States; it was conceded by the Government that during his enforced stay in Germany plaintiff did not vote in any elections or engage in any efforts in aid of the German war effort, did not own any property there and never committed any act

hostile or inimical to the interests of the United States. On November 2, 1949, plaintiff and his wife filed their declarations to become naturalized citizens of the United States, and on December 9 received their first papers. Plaintiff contended that at the time the vesting orders were issued he was not under § 9 of the Trading with the Enemy Act an "enemy or ally of enemy", defined by § 2 of the Act as including "any individual . . . of any nationality, resident within the territory . . . of any nation with which the United States is at war", and therefore was entitled to the return of his property. Defendant's motion to dismiss was granted and plaintiff's motion for summary judgment dismissed.

The Court ruled in a memorandum opinion that, although plaintiff was free from "enemy taint" and would not have been estopped from recovering under § 9 of the Act, his claim was barred by § 39 of the Trading with the Enemy Act (50 USC App. 39) since he was a "national" of Germany within the intendment of that provision. Enacted as an amendment to the Act on July 3, 1948, § 39 provides that "no property or interest therein of Germany, Japan or any national of either such country" vested by the Government at any time after December 17, 1941, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein. The Court found that as a citizen of Germany at the time of vesting plaintiff was to be regarded as a German "national" within the definitions of that term in both the Nationality Act of 1940 and Executive Order 8389 (§ 5-E [1]), the latter including "any person who has been domiciled in, or a subject, citizen or resident of a foreign country at any time on or since the effective date of this Order". In dealing with the argument that such a construction of § 39 did not distinguish between friendly and unfriendly enemy aliens and would impose hardship on persons loyal to the United States, the Court noted from its legislative history that Congress intended § 39 to apply to *all* citizens and subjects of Germany or Japan wherever located and was well aware that under its confiscation provisions "many perfectly innocent people" would "lose their all". The Government's right to confiscate the property of a national of an enemy nation was not deemed to be limited by the due process or just compensation clause. The Court found no support for plaintiff's position in *McGrath* v. *Zander*, 177 F. (2d) 649 (35 A.B.A.J. 63, 1021, 1022, January, December, 1949), since that case was filed four months before the adoption of § 39 and since plaintiff there, although married to a German citizen and detained in Germany during the war, was an American citizen whose citizenship was preserved under the Cable Act.

(See also *Schill v. McGrath, U.S.* D.C., S.D.N.Y., February 20, 1950, J. R. Kaufman, D. J., in which the court ruled that there was no exception to the operation of § 39 where the former owner of vested property was a German citizen who had been continuously resident in the United States since 1904 and who subsequently obtained American citizenship in 1949; the status of the property when vested rather than the status of the claimant at the time of suit was said to be controlling.)

(*Cf., Nagano* v. *Clark*, U.S.D.C., N.D. Ill., March 16, 1950, Campbell, D. J., where, although the claimant was held barred on other grounds, it was stated that § 39 was not relevant to a case brought under § 9 (a).)

Further Proceedings in Cases Reported in this Division

CERTIORARI DENIED, May 1, 1950: *Local 36 of International Fishermen & Allied Workers of America* v. *U. S.*—Monopoly (36 A.B.A.J. 59, January, 1950); *The Charter Oak Fire Insurance Co.* v. *Gerrity*—Insurance (35 A.B.A.J. 422, May, 1949; 36 A.B.A.J. 318, April, 1950).

■ The following action has been taken by the United States Court of Appeals for the Eighth Circuit:

AFFIRMED, April 5, 1950: *North Little Rock Transportation Co., Inc.* v. *Casualty Reciprocal Exchange, et al.*—Monopolies (35 A.B.A.J. 1019, December, 1949).

■ The United States District Court for the District of Columbia, on April 17, 1950, found defendant not guilty of violating the Federal Regulation of Lobbying Act: *U. S.* v. *Slaughter*—Constitutional Law (36 A.B.A.J. 406, May, 1950).

Law and the Laymen

(Continued from page 490)

tance. Newspapers can be induced to run a series of articles. Leading editors can be persuaded to write editorials. Comparisons can be made with other systems.

One of the essential ingredients for success is that the campaign must be nonpartisan. From the beginning, effort must be made to secure the support of prominent, respected and independent members of both political parties and, in addition, to enlist those citizens who do not customarily engage in political activity. As the campaign leaders should be bipartisan, so should the necessary solicitation of funds. Extreme care should be exercised that the program does not become associated with one political party or group. Therefore, contributions should be solicited on an individual and not a group basis.

The appeal should be made on the basis that the program is not designed to harm either party, is not planned to be of assistance to either party; but that it rises above partisan consideration and is essential in order that the proposed judicial system can best serve the interests of all the citizens.

The County-Seat Lawyer

■ The county-seat lawyer, counsellor to railroads and to Negroes, to bankers and to poor whites, who always gave to each the best there was in him—and was willing to admit that his best was good. That lawyer has been an American institution—about the same in South and North and East and West. Such a man understands the structure of society and how its groups interlock and interact, because he lives in a community so small that he can keep it all in view. Lawyers in large cities do not know their cities; they know their circles, and urban circles are apt to be made up of those with a kindred outlook on life; but the circle of the man from the small city or town is the whole community and embraces persons of every outlook. He sees how this society lives and works under the law and adjusts its conflicts by its procedures. He knows how disordered and hopelessly unstable it would be without law. He knows that in this country the administration of justice is based on law practice. Paper "rights" are worth, when they are threatened, just what some lawyer makes them worth. Civil liberties are those which some lawyer, respected by his neighbors, will stand up to defend. Any legal doctrine which fails to enlist the support of well-regarded lawyers will have no real sway in this country.

It has been well said that "The life of the law has not been logic: it has been experience." The experience that gave life to our judge-made and statutory law, at least until the last few years, was this type of country life. From such homes came the lawyers, the judges and the legislators of the nineteenth century. Their way of living generated independence and amazing energy, and these country boys went to the cities and dominated the professions and business as well. They controlled the country courthouses and the state houses and the Nation's capitol as well, and they weighed legal doctrines, political theories, and social policies in the light of the life they knew. If we would understand the product of those courthouses and state houses, we must understand that life and the impression it made on the minds of men. Much of the changing trend of law and of political and social policy is due to the declining number of men who have shared this experience. More men now come to the profession from the cities, fewer from farms. There isn't a whiff of the stable in a carload of college freshmen. More and more those who in court and classroom and legislative body restate our legal principles are men who have not experienced the country life of which our law was so largely the expression.

The county-seat lawyer and the small-town advocate are pretty much gone, and the small-city lawyer has a struggle to keep his head above water. Control of busines has been concentrated in larger cities, and the good law business went to the city with it. The lawsuit has declined in public interest before the tough competition of movie and radio. Most rural controversies are no longer worth their cost to litigate. Much controversy has now shifted to the administrative tribunal, and the country lawyer hates it and all its works.

But this vanishing country lawyer left his mark on his times, and he was worth knowing. He "read law" in the *Commentaries* of Blackstone and Kent and not by the case system. He resolved problems by what he called "first principles." He did not specialize, nor did he pick and choose clients. He rarely declined service to worthy ones because of inability to pay. Once enlisted for a client, he took his obligation seriously. He insisted on complete control of the litigation—he was no mere hired hand. But he gave every power and resource to the cause. He identified himself with the client's cause fully, sometimes too fully. He would fight the adverse party and fight his counsel, fight every hostile witness, and fight the court, fight public sentiment, fight any obstacle to his client's success. He never quit. He could think of motions for every purpose under the sun, and he made them all. He moved for new trials, he appealed; and if he lost out in the end, he joined the client at the tavern in damning the judge—which is the last rite in closing an unsuccessful case, and I have officiated at many. But he loved his profession, he had a real sense of dedication to the administration of justice, he held his head high as a lawyer, he rendered and exacted courtesy, honor and straightforwardness at the Bar. He respected the judicial office deeply, demanded the highest standards of competence and disinterestedness and dignity, despised all political use of or trifling with judicial power, and had an affectionate regard for every man who filed his exacting prescription of the just judge. The law to him was like a religion, and its practice was more than a means of support; it was a mission. He was not always popular in his community, but he was respected. Unpopular minorities and individuals often found in him their only mediator and advocate. He was too independent to court the populace—he thought of himself as a leader and lawgiver, not as a mouthpiece. He "lived well, worked hard, and died poor." Often his name was in a generation or two, forgotten. It was from this brotherhood that America has drawn its statesmen and its judges. A free and self-governing Republic stands as a monument for the little known and unremembered as well as for the famous men of our profession.

ROBERT H. JACKSON
Supreme Court of United States

Department of Legislation

Harry W. Jones, Editor-in-Charge

■ It is an encouraging sign of the times in legal education that law teachers are becoming less exclusively preoccupied with case law processes and methods than has been the situation during most of of the life of the law school case system. University law schools in all parts of the country are giving increasing thought to the opportunities open to them for constructive participation in the legislative development of the law. A noteworthy undertaking in legislative research and drafting is now in progress at the School of Law of the University of Pittsburgh. The following short description of the University of Pittsburgh Health Law Research Project will be of particular interest to lawyers actively concerned in the improvement of the statute law.

The Public Health Law Research Project of the University of Pittsburgh

■ At the request of the health authorities of the City of Pittsburgh and the Commonwealth of Pennsylvania, the School of Law of the University of Pittsburgh has launched a significant legislative research and drafting project looking toward compilation and revision of laws in the field of public health. Begun last June, the Public Health Law Research Project has carried out intensive research in the ordinances, regulations and state laws administered by Pittsburgh in the health field. It is presently completing one urgently-needed segment of its work—the publication of a compilation of the ordinances, laws and regulations presently in force in Pittsburgh.

This compilation will include, in addition to the text of the applicable legislation, comments by the editors concerning legislative history, judicial interpretation and administrative practice and construction. The product of numerous interviews with public health officers and administrators in the city and state governments, the information concerning administrative practice will not only serve to provide valuable background knowledge of enforcement and procedure in the fields of municipal regulation of sanitation and disease control, but will also form the basis of judgments with regard to the adequacy and effectiveness of particular legislative programs. Since the compilation will ultimately provide the text from which to work in preparing a model code of public health laws for the city, complete information as to the operations of the bureaus and divisions of the Department of Public Health, as well as other departments of the city government was considered necessary.

The research methods adopted by those engaged in the project were predominantly determined by the nature and source of the materials with which they worked. Thus it was necessary to devote the first few months to the collection, copying and analysis of city ordinances relating to health. Copies of the ordinances were borrowed from the files of the Pittsburgh Department of Public Health, or, in some cases, made from the ordinance books in the city clerk's office. A study of state legislation was then undertaken with particular attention to the relevant statutes governing municipal health powers, and to laws of general application enforced by state officers in particular fields, such as food and restaurant sanitation, that might limit or altogether supersede local regulations.

Consultation with administrative officials in the health field followed the assembling of materials. The operation of each ordinance and statute was checked in the interviews and a memorandum of each conference was prepared. On the basis of the knowledge gained from these conferences and an analysis of the state and local legislation, a series of questions of law involving conflicts or possible conflicts between state and municipal regulatory programs was prepared and submitted to the city solicitor for an opinion respecting the validity of the local ordinances. Further conferences on these questions were held with officials of the Department of Public Health and of the city solicitor's office.

Final preparation of the compilation of the city's public health laws was then begun, and the contents checked by members of the law school faculty, the staff of the University's Institute of Local Government, officials of the Department of Public Health and the city solicitor's office. Early publication is expected.

On completion of this phase of the work, the Project will proceed with a similar analysis and compilation of state laws and regulations of general applicability throughout Pennsylvania. In order that the work of revision may be begun at the earliest time possible, it is planned to begin a revision of a small segment of the Pittsburgh health laws at the same time that the compilation of existing state public health legislation is under way. Upon completion of the compilation of the state materials, full-scale revision of the city's public health laws will be in progress. It is expected that a similar revision of the state health laws and regulations will be undertaken at a later date, and that such revision may be undertaken with active coöperation with the Law School of the University of Pennsylvania.

The drafting of the model health codes by the Project will necessarily involve the coöperation of public health officials, consultants in particular fields of public health and local government, the Graduate School of Public Health and the law school. For this purpose, it is planned to create small consultative technical committees to work on the revision

of specific phases of public health legislation. In addition, advice on more general questions of policy will be sought from representatives of the city and state health departments as well as of various civic, labor, business and professional groups. The changes agreed upon will then be fitted into a legislative pattern by the Project.

This ambitious enterprise had its inception in part in the recommendations of separate survey reports on the public health activities of the City of Pittsburgh and the Commonwealth of Pennsylvania. Both reports, prepared by the United States Public Health Service and the American Public Health Association respectively, stressed the need of codification and revision of the mass of state and municipal public health legislation, much of it old and outmoded, presently on the statute books. In a greater part, however, the Project owes its existence to the earnest desire of the University of Pittsburgh, its law school, and its dean, Charles B. Nutting, to develop in the law school the competence and the will to serve local government in the solution of its manifold problems. Coming at a time when the University was expanding with the creation of a new Graduate School of Public Health, the demand for the Project could be realized by a peculiarly fortunate aggregate of facilities. The faculty of the public health school is able to lend its experience, technical knowledge and research facilities; the University's Institute of Local Government provides its knowledge of municipal problems and their solution; and the school of law provides the legal training and research. Thus the Project is realizing a dual purpose—it is meeting an urgent need of local government by its specific assignment in this work, and at the same time it is developing, by coöperative University endeavor, a professional competence to deal with the needs and objectives of local government that municipal and state resources would not ordinarily be able to provide.

The financial support for the work has come from the A. W. Mellon Educational and Charitable Trust, which is also responsible for the establishment of the University's new Graduate School of Public Health. The Project is under the general supervision of Dean Nutting, who has had extensive experience in the field of public law and legislation. Professor Harold Gill Reuschlein, formerly Chief of the Office of Legislative Services, Headquarters, Army Air Force, who has made municipal problems one of his specialties, is its Director. Robert C. Brown, also a professor in the school of law, who served as an adviser to the Indiana Gross Income Tax Division and who is presently an adviser to the Pennsylvania Joint State Government Commission, serves in a consultative capacity. The work of research, writing and ultimate draftsmanship is in the hands of two research fellows, both recent graduates of the University of Pittsburgh School of Law, James C. Kuhn, Jr., former editor-in-chief of the *University of Pittsburgh Law Review* and law clerk to Judge Dithrich of the Superior Court of Pennsylvania, and David Stahl, former case editor of the *Law Review* and an instructor in the University's Political Science Department.

Public health laws suffer not only from indifferent draftsmanship to which so many state and local laws are heir, but also from the fact that science has moved rapidly in the past fifty years. Laws often include the vestigial remains of the obsolete science; they are geared to the medical knowledge of 1900 or 1920 rather than that of 1950. Codification is no mere problem of ironing out verbal and legal inconsistencies. To create a code that will most effectively serve the present and the future requires the closest kind of collaboration among legal, administrative and scientific personnel. It is hoped that at Pittsburgh, through the school of law, the school of public health, the Institute of Local Government, and the collaboration of city and state agencies, codes may be created that will be a major demonstration of the value of coöperation among the several professions and government officials.

Third International Congress of Comparative Law

■ The Third International Congress of Comparative Law will be held in Lincoln's Inn and Gray's Inn, London, England from July 31 to August 5. The conference, which is sponsored by the International Academy of Comparative Law, will be attended by delegations from more than twenty-eight countries, including the United States.

The program of the Conference includes the following subjects: history of law, ecclesiastical law, legal ethnology, Oriental law, philosophy of law, study and teaching of law, civil law, private international law, civil procedure, commercial law, rights of authorship, industrial legislation, public law, penal law and public international law.

Members of the Bar that are interested in participating in the Congress should communicate at once with Professor Hessel E. Yntema of the University of Michigan Law School, Hutchins Hall, Ann Arbor, Michigan. Professor Yntema is Chairman of the United States Committee for the Third International Congress of Comparative Law.

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

■ An interesting resumé of the work of the Statute Law Committee was given in an oral answer made by the Solicitor General in the House of Commons on October 31, 1949. The tasks set before that Committee in 1947 were those of consolidating scattered enactments, so that the statute law may more easily be found and understood, and the reduction of the bulk of the published volumes of statutes and statutory instruments and keeping up to date the necessary indexes to them, as well as providing means whereby they may readily be noted up annually. This tremendous task was long overdue. So much so, in fact, that it had been left to the private enterprise of legal publishing firms to supply annotated editions of the statutes that enabled the practitioner to find his way, more or less comfortably, through the mass of material with which he had to deal in his general practice. In fact a new edition of annotated statutes is in course of publication at the present time by one such firm.

A good start was made in the matter of consolidation of statutes in the session 1947-8, by placing on the statute book The Companies Act, The Agricultural Wages Act, The Agricultural Holdings Act, and the National Service Act. In the session just closed further progress has been made by the passing of the Consolidation of Enactments (Procedure) Act, resulting in several more consolidating acts being passed. It is also claimed that the new Marriage Act, with the assistance of the new procedure, will reduce the exceptionally chaotic statute law on this subject to a form which is surprisingly short and simple. In all, the consolidating acts already passed will take the place of sixty-two Acts ranging from 1540 to 1949.

The Statute Law Committee also have in hand a third edition of "Statutes Revised", which it is intended to publish complete in thirty-three volumes. These volumes will contain the statutes in force from the beginning of Parliament to the end of the year 1948. It had been hoped to publish this revision during 1949, but, owing to difficulties which could not be foreseen, it now seems unlikely that it will appear before the end of August in this year. The Committee is also undertaking a third edition of the statutory rules and orders and statutory instruments, the first volume of which is expected very shortly.

Capital Punishment

The Royal Commission on Capital Punishment has recently considered memoranda and evidence submitted by judges of the High Court, and, without exception, those who have already expressed their views are unanimously in favour of the retention of the sentence. The Lord Chief Justice, Lord Goddard, does not favour the division of the crime of murder into two categories, although he is of opinion that it is desirable to define by statute the circumstances that render homicide murder, for which sentence of death should be passed; all other cases being regarded as manslaughter, unless the killing could be justified. The jury's power to return a verdict of manslaughter on an indictment for murder was, he thought, one of the safeguards or methods of mitigating the application of too rigorous a rule of law. Under the existing law, if there was evidence of facts which, if accepted could amount to provocation in law, the judge was bound to leave it to the jury to find a verdict of murder or manslaughter, but, failing such evidence, he should not so leave it open to the jury. Lord Goddard gave it as his opinion that it would be very undesirable to leave to the judge a discretion whether or not to pass the capital sentence for murder since judges differed in temperament as much as other men. The Lord Chief Justice expressed very emphatically his views as to the question of insanity. In referring to the Criminal Justice Act of 1884 he urged that more consideration should be given to Section 2 (4). He said that in his view the section had never intended to give power to qualified medical practitioners to reverse the verdict of the jury, as had happened over and over again. The object of the section was to provide for the case of a convict becoming insane after conviction and before execution. If a verdict had been given that the accused was sane both at the time of commission of the crime and at the time of the trial, then, unless there had been a change in his mental condition after conviction, a finding by a medical commission that he was insane, meaning that he was insane at the time of the commission of the crime, was a flat reversal of the jury's verdict. He agreed that there were cases in which it was right to reprieve, but was of opinion that the royal prerogative was exercised a little too freely and the cases which had impressed him most were the murder cases on an accusation of adultery.

Mr. Justice Humphreys held similar views on the prerogative of mercy. Everyone, he said, would assume that the Secretary of State would do his best upon the material before him, but no individual, however eminent, was capable of judging a criminal trial unless he had seen and heard the witnesses.

Mr. Justice Byrne did not agree that the judge should have a discretion, on convicting a murderer, to pass either a sentence of death or a sentence of imprisonment for life. It would cast upon the judge an intolerable duty, which would have to be discharged without adequate assistance or material. He held the same view as the Lord Chief Justice that capital punishment was certainly a deterrent so far as concerned those persons who were disposed to commit crimes of violence and would not necessarily hesitate to kill in order to effect their escape.

Practising lawyer's guide to the current LAW MAGAZINES

Calvin P. Sawyier • Editor-in-Charge

CORPORATIONS – *"SEC Regulation of Corporate Proxies":* In the March, 1950, issue of the *Harvard Law Review* (Vol. 63—No. 5; pages 796-821) Daniel M. Friedman surveys the first fifteen years of SEC rules governing proxy solicitation by management. Early apprehension as to the effect of such rules as the one requiring management to include in its proxy material solicitation proposals by a shareholder has, in the author's opinion, proved groundless. The shareholder's remedies, both direct and collateral, for management's violation of the SEC rules are discussed in the light of the decisional law. The author suggests several amendments, among which are (1) an extension of SEC jurisdiction to widely held corporations not listed on a national exchange; and (2) regulations to insure full disclosure of pending action even though management solicits proxies only partially or not at all. Making corporate funds equally available to shareholders and management during proxy fights and the creation of "some private or public agency charged with representing the viewpoints and protecting the interests of the various non-management groups" are mentioned as possible developments in this field. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1.00.)

CORPORATIONS – *"Corporations—Dividend Rights—Elimination of Accrued Dividends by Direct Charter Amendment":* This comment in the March, 1950, issue of the *Michigan Law Review* (Vol. 48—No. 5; Pages 657-666) undertakes a statement of basic analysis applicable to elimination of accrued cumulative preferred dividend rights, whatever the method used; a brief comparison of the three principal methods that have been employed for this purpose; a summary of the current status of the law, particularly in the light of the position adopted by the Illinois Supreme Court in *Western Foundry Company* v. *Wicker,* 85 N. E. (2d) 722 (Ill. 1949), in which case very general statutory language was construed so as to permit elimination of accrued dividends by direct charter amendment. (Address: Michigan Law Review, The Michigan Law Review Association, Ann Arbor, Mich.; price for a single copy: $1.00.)

CORPORATIONS – In the January, 1950, issue of the *Dickinson Law Review* (Vol. LIV—No. 2) are two articles that discuss recent Pennsylvania legislation pertaining to corporations. F. Eugene Reader details the "1949 Amendments to the Business Corporation Law" (pages 172-176) and analyzes briefly the changes made, including the two new provisions concerning foreign corporations. Richard H. Wagner does the same type of job for the "1949 Amendments to the Unemployment Compensation Law" (pages 177-181). (Address: Dickinson Law Review, Carlisle, Pa.; price for a single copy: $1.00.)

COURTS—A note, "Controlling Press and Radio Influence on Trials", in the March, 1950, issue of the *Harvard Law Review* (Vol. 63—No. 5; pages 840-853) treats of the timely subject of the effect of the news reporting of cases, both civil and criminal, on the trial of such causes. A party's interest in obtaining a fair trial is protected by no common law remedy, and the author discusses the efficacy and social desirability of the various protections that may be afforded, such as statutory rights of action against the offending publisher, granting of a new trial, change of venue, and exercise of the court's contempt powers. Difficulties of proof and constitutional limitations are encountered here, but on the whole they represent, to the author's mind, more workable and acceptable methods of alleviating the evil effects of crime-and-scandal journalism on the judicial process than do such schemes as keeping information concerning the pretrial investigation and the trial out of the hands of the press or admitting reporters only on condition that they conform to a code of reporting rules. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1.00.)

EVIDENCE – *"Wiretapping—The Right of Privacy versus the Public Interest":* In the November-December, 1949, issue of the *Journal of Criminal Law and Criminology* (Vol. 40—No. 4; pages 476-483), Ferdinand J. Zeni, Jr., discusses the legal aspects of wiretapping. Set forth are the remedies available to a private party, the attempt at prevention by refusing

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

to admit the evidence thus obtained and the present proposals in Congress for some changes to allow certain officials to "tap" wires. The article indicates that the private remedies are not adequate, the citizen's real protection coming from whatever judicial and executive self-restraints the Government provides. The author concludes that the proposed legislation indicates a concession to the desire for more efficient investigation in matters of national security with even greater protection extended to the right of privacy in less important situations. (Address: Journal of Criminal Law and Criminology, Northwestern University School of Law, 357 E. Chicago Ave., Chicago 11, Ill.; price for a single copy: $1.25.

INSURANCE—*"Changing the Beneficiary of a Life Insurance Contract":* In the March, 1950, issue of the *Michigan Law Review* (Vol. 48—No. 5; pages 591-602), Professor Grover C. Grismore discusses the disposition to be made of proceeds of life insurance where the insured has manifested an intention to change the beneficiary, but has not complied with necessary formalities. Difficulty arises when incapacity has prevented completion of formalities and when an intention to change is manifest but no steps have been taken. Reviewing the confused state of the law, the author suggests that the prescribed formalities be held to be solely for protection of the insurer, so that payment by insurer to the formally designated beneficiary would discharge his obligation. The court, on interpleader or in a suit brought against the recipient of the fund, could award the fund to claimant on proof that he was the intended beneficiary. (Address: Michigan Law Review, The Michigan Law Review Association, Ann Arbor, Mich.; price for a single copy: $1.00.)

LABOR LAW—*"The No-Strike Clause":* In the Fall issue of the *University of Pittsburgh Law Review* (Vol. 11—No. 1, pages 13-34), Walter L. Daykin, by means of a comprehensive examination of National Labor Relations Board cases and of arbitration decisions, presents a survey of the legal effects of no-strike clauses in collective bargaining agreements. The article covers the advantages and liabilities to the company, the union and union officers which such clauses have produced. (Address: University of Pittsburgh Law Review, 236 Chestnut Street, Philadelphia 6, Pa.; price for a single copy: $1.00.)

LABOR LAW—*"Union Responsibility and the Enforcement of Collective Bargaining Agreements—A Study of the Background and Application of Section 301 of the Labor Management Relations Act of 1947":* In this article by Seymore Philip Kaye and Ernest G. Allen in the January, 1950, issue of the *Boston University Law Review* (Vol. 30—No. 1; pages 1-29), the authors develop their study of collective bargaining agreements by a discussion of the concepts of contract enforceability, the history of the suability of unions prior to 1947, suability under Section 301 of the Labor Management Relations Act of 1947 and the judicial and quasi-judicial methods of contract enforcement. The problems in labor arbitration are given especial attention. (Address: Boston University Law Review, 11 Ashburton Place, Boston, Mass.; price for a single copy: $1.00.)

TAXATION — *"Alimony Trusts: Tax and Drafting Considerations":* In the April issue of *Trusts and Estates* (Vol. 89—No. 4; pages 244-249), Stephen T. Dean analyzes the federal income, gift and estate tax treatment of alimony payments. The trust agreement must be drafted with three principal tax considerations in mind: first, on whom to place the income tax burden; second, the avoidance of federal gift tax liability of the husband; third, the provision of a deductible claim against the husband's taxable estate, assuming that the alimony obligation survives his death. Mr. Dean discusses suggested clauses on these points as well as other items that are secondary to the principal alimony arrangement, but that nevertheless must be dealt with. (Address: Trusts and Estates, 50 East 42d St., New York 17, N. Y.; price for single copy: 60 cents).

TAXATION—*"Income Tax Penalties":* In the January issue of the *Tax Law Review* (Vol. 5, No. 2; pages 131-197), by Emanuel L. Gordon, is an extensive and fully-documented survey, arranged according to the pertinent sections of the Internal Revenue Code, of both the civil and criminal penalties applicable to income tax returns. The author concludes that, like many parts of the tax law, the income tax penalties are the product of piecemeal enactment and consequently display no logical organization—either as between the civil and criminal provisions or internally. Overlapping within the field of criminal penalties, the anomaly of jury convictions in criminal cases where the evidence would not result in a finding of civil fraud, and conflicting rulings on subsidiary points among the various penalties are some of the reasons which lead the author to advocate a complete legislative revamping in this field. (Address: Tax Law Review, New York University School of Law, 100 Washington Square East, New York 3, N. Y.; price for a single copy: $2.00.)

TORTS—*"Television and Torts":* A comment in the January issue of the *Missouri Law Review* (Vol. 15—No. 1; pages 48-57) discusses tort liabilities that have been imposed or are likely to be imposed in connection with television broadcasts. Particular attention is given to situations that may give rise to actions of libel and slander and to actions based upon the "invasion of privacy", although reference is also made to matters of copyright, unfair competition and obscenity. (Address: Missouri Law Review, University of Missouri School of Law, Columbia, Mo.; price for single copy: 85c.)

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Other People's Taxes

■ Federal income taxes are of course not deductible in computing the taxpayer's net taxable income. And the net taxable estate for estate tax purposes is likewise determined without deduction for the amount of taxes payable thereon. But suppose one is required by contract or as a transferee to pay the taxes of another. May the payer derive a tax advantage from the payment? This question has been considered or at least suggested by a number of recent Tax Court cases.

Muriel D. Neeman, 13 T.C.—No. 55, involved an alimony contract incident to a divorce. The husband had assumed the obligation to pay the income tax on the alimony payable to the wife. The court held that the alimony payments were nevertheless taxable to the wife. The Commissioner did not seek to tax the husband's tax payments to the wife as additional alimony under Section 22 (k), but this would seem to be a logical extension of the case. And if taxable to the wife such payments would presumably be deductible by the husband under Section 23 (u).

This result is foreshadowed by the early cases on compensation and rents. Where an employer agrees to pay his employees' income taxes the amount of the tax is additional compensation—taxable to the employee and deductible by the employer. *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716. And the same is true of "tax free" rental arrangements. *U. S.* v. *Boston and Maine Rail Road,* 279 U.S. 732. Incidentally these situations—and the analogous alimony case—may, theoretically, involve a "circular" calculation, since the additional income to the person liable for the tax may give rise to an additional contract liability on the part of the payer, further increasing taxable income, and so on *ad infinitum.* As a practical matter the Commissioner has not attempted to go beyond the first tax payable under such contracts.

The further development of this rule in connection with alimony will be worth watching. Apparently the husband may safely commit himself to the payment of the wife's income taxes, and if he does so his tax payments, while possibly increasing his wife's taxable income, may give rise to an additional deduction in his return.

Two recent cases involved the payment of an income tax deficiency by shareholders as transferees of the assets of a liquidated corporation. In *Stanley Switlik,* 13 T.C. 121, the corporation was liquidated in 1941 and the assets were distributed to the shareholders. This was a capital transaction, capital gain or loss to each shareholder being based upon the difference between the value of the net assets received and the basis of his stock. Section 115 (c). Subsequently the Commissioner determined a deficiency against the corporation and in 1944 the shareholders as transferees were required to pay $35,000 in additional corporate income taxes. The Commissioner contended that this payment was referable to the prior capital transaction and should be treated as a capital loss to the paying shareholder. The Tax Court sustained the taxpayer and allowed an ordinary loss deduction in 1944 for the full amount paid plus expenses.

The other case on this point is *Roberta Pittman,* 14 T.C.—. There the contentions of the parties were reversed. The taxpayer was seeking to reduce her capital gain on liquidation by the amount of the corporate tax subsequently paid by her as transferee. The Tax Court, consistent with its decision in the *Switlik* case, held that the tax payment could not be referred back to the prior transaction. It must be taken into account, if at all, in the year of payment.

A somewhat similar problem has recently arisen in the estate tax field. In *Irene C. Moffett,* 14 T.C.—, the taxpayer was the surviving annuitant under a joint and survivorship annuity contract purchased by the decedent, her husband, for $730,000. The contract was included in the decedent's estate and resulted in an estate tax deficiency. The taxpayer paid $48,000 of this deficiency in order to protect her annuity against a transferee assessment. Under the 3 per cent rule of Section 22 (b) (2), the annuity payments under the contract were includable in the annuitant's gross income to the extent of $21,900 each year, representing 3 per cent of the $730,000 cost of the contract. The taxpayer contended however that these payments should not be taxed until she had recovered her $48,000 estate tax payment. The Tax Court reached an intermediate result between this position and the Commissioner's disallowance of any deduction. The court held that the taxpayer had made a capital payment that should be amortized and deducted over the life of the contract, which in this case would correspond to her own life expectancy. For example, the court said, if the taxpayer's expectancy was fifteen years she would be allowed a deduction each year of one-fifteenth of the $48,000. Thus the taxpayer-transferee in the peculiar circumstances of this case was permitted to treat the estate tax as a capital investment recoverable tax free out of future payments.

What happens when a donee as-

sumes the payment of the donor's gift tax liability? The Tax Court has indicated that such a commitment may be taken into account in valuing the net gift subject to tax. *Estelle M. Affelder,* 7 T.C. 1190. The donee's agreement may also affect the donor's income and estate taxes. If the income from the gift property is to be used to pay the gift tax, then it has to that extent been reserved by the donor for his own benefit and so much of it would presumably be taxable to the donor. Furthermore the reserved income interest might perhaps draw the gift property back into the donor's estate for estate tax under Section 811 (c) (1) (B). Compare the contention of the Commissioner in *Estate of Mary Hays* v. *Commissioner,* decided by the Fifth Circuit on April 14, 1950, P-H Tax Service, par. 72,512, *reversing* 12 T.C. 210. The decedent had created a trust of mortgaged property, authorizing the trustee to use trust income to discharge the mortgage. The Commissioner's treatment of this provision as a reserved interest under Section 811 (c) was overruled by the Court of Appeals on the ground that after the transfer the donor was only secondarily liable on the mortgage. But th's rationale would hardly be applicable to the gift tax that is imposed directly on the donor.

Food Law Institute Is Organized

■ The Food Law Institute was recently organized in New York, with offices at 608 Fifth Avenue in New York City; and the term "food law" here includes the related drug and cosmetic laws. The Institute is a wholly public organization, its officers receive no compensation and its trustees include deans of law schools. It was established by leading food manufacturers to develop the law of food; and it supplements The Nutrition Foundation previously organized by them, to develop the science of food. It has the practical significance that the food law is ranked as the commercial law of greatest economic and social importance in the land. For it governs the largest food industry, it regulates the most important food and drug products, and it is the commercial law of first concern to public health. Hence its development is a matter of great national interest.

The Institute is designed to play a new rôle in the constructive development of the food law and it has two objectives. The first objective is to stimulate basic instruction in this law at university law and other interested schools, on a postgraduate level. This is pioneer action, since no university law school has heretofore taught this subject, and consequently its instruction represents a new advance in specialized legal education. The purpose is thus to provide the legal profession with an understanding of this law, to train legal experts in it for both public and private service, and to develop national leaders in it. The second objective is to publish a series of basic research compilations and studies of this law, which will constitute an authoritative library on it.

To accomplish the first objective the Institute is organizing a plan of food law instruction by university law schools, public health and business schools throughout the country; and it has underwritten an original major food law program at the New York University School of Law. This program was instituted during the current academic year and has proved to be a notable success. For the highest food law officials and experts are coöperating in it; and it has invited a graduate lawyer registration of about forty. This registration includes five carefully chosen fellowship students. They are instructed in related trade regulation laws; each is a candidate for the highest law degree and all will subsequently teach or practice food law. To accomplish the second objective, the Institute has developed a long-range program of research books that will be published by Commerce Clearing House, Inc., in a distinctive format. This program initially includes annotated compilations of the federal, state and leading foreign food laws; historical compilations of the official reports under the national food law; informative studies of the special food sanitation, food standards and nutrition laws; guiding studies of important food law problems such as that of chemical additions and pesticide residues; and a practical manual on the food products liability law.

The President of The Food Law Institute is Charles Wesley Dunn, long general counsel for the organized food and pharmaceutical industries and general or special counsel for numerous food and pharmaceutical manufacturers. Mr. Dunn is chairman of the food, drug and cosmetic law organizations in both the American and New York State Bar Associations; he is chairman of the editorial advisory board for the *Food Drug Cosmetic Law Journal;* and he is a professor of law at New York University, in charge of its original food law program.

THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

Formulation of the Nuremberg Principles by the International Law Commission

■ On the initiative of the United States, the General Assembly of the United Nations on December 11, 1946, affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal", and directed the preparation of plans for the formulation of these principles, in the context of a general codification of offenses against the peace and security of mankind. By another resolution, dated November 21, 1947, the General Assembly entrusted the task of formulating the Nuremberg principles to the International Law Commission.

The International Law Commission decided in May, 1949, that it need not concern itself with the question whether or not the Nuremberg principles constituted principles of international law but that it should merely formulate them. It also refused to extend its work to general principles of international law underlying the Charter and the judgment.

After a preliminary consideration of the subject, the Commission appointed J. Spiropoulos rapporteur and asked him to present a report on the Nuremberg principles at its next session, in June, 1950. The main part of that report is as follows (U. N. Doc. A/CN.4/22).

Report on the Nuremberg Principles

by J. Spiropoulos

A. THE PRINCIPLES STRICTO SENSU

The Charter and judgment of the Nuremberg Tribunal recognize the following principles:

Principle I

Any person who commits or is an accomplice in the commission of an act which constitutes a crime under international law is responsible therefor and liable to punishment.

1. The above principle is based on the first paragraph of Article 6 of the Charter which established the competence of the International Military Tribunal to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the crimes provided for by sub-paragraphs (a), (b), and (c) of Article 6. While this text declares punishable only persons "acting in the interests of the European Axis Powers", Principle I is drafted in general terms.

2. Principle I declares liable to punishment not only the perpetrators of international crimes but also the accomplices in the commission of those acts.

Prima facie, this principle seems to go further than the Charter. The only provision in the latter regarding responsibility for complicity is that of the last paragraph of Article 6 which reads as follows: "Leaders, organizers, instigators and accomplices participating in the formation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan." In fact, as worded, this paragraph does not concern all cases of complicity but is limited to the participation in a common plan of conspiracy. Complicity in individual crimes is not mentioned.

The Tribunal, commenting on the last paragraph of Article 6 in connexion with its discussion of Count One of the indictment, which charged the conspiracy not only to commit aggressive war but also to commit war crimes and crimes against humanity, said that, in its opinion, "these words [namely, the last paragraph of Article 6] do not add a new and separate crime to those already listed". In the view of the Court, "these words were designed to establish the responsibility of persons participating in a common plan to prepare, initiate and wage aggressive war".

Interpreted literally, this statement would seem to imply that the complicity rule does not apply to individual crimes.

On the other hand, the Tribunal must have applied some complicity rule to crimes other than the common plan or conspiracy to prepare, intiate or wage aggressive war. Several of the defendants were convicted of war crimes and crimes against humanity because they gave orders resulting in atrocious and criminal acts which they did not commit themselves. They were accomplices in the wide sense of the word. In practice, therefore, the Tribunal must be considered as having applied either the last paragraph of Article 6 by analogy or general principles of criminal law regarding complicity. This view is corroborated by the expressions used by the Tribunal in assessing the guilt of particular defendants.

3. The general principle of law underlying Principle I is that international law may impose duties on the individuals directly without any interposition of domestic law. A conception which in theory is considered as involving the "international personality" of individuals. The findings of the Court are very definite on the question of whether rules of international law may apply to individuals. "That international law imposes duties and liabilities upon individuals as well as upon

States", says the Court, "has long been recognized". And elsewhere: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".

Principle II

The fact that domestic law does not punish an act which is an international crime does not free the perpetrator of such crime from responsibility under international law.

1. The idea contained in Principle II is stated expressly only in subparagraph (c) of Article 6 of the Charter which deals with crimes against humanity. Nevertheless, it applies to all the three categories of crimes provided for by Article 6. In reality, once the responsibility of individuals for international crimes is admitted, Principle II seems unnecessary, since the implementation of Principle I presupposes that domestic law cannot keep in check the international responsibility of individuals. Nevertheless, since subparagraph (c) of Article 6 expressly mentions the idea expressed by Principle II and since, on the basis of general considerations, it applies also to the other two sub-paragraphs of Article 6, the formulation of Principle II seems opportune in order to exclude any doubt about the general applicability of this principle with regard to responsibility for the commission of international crimes.
2. The principle that a person committing an international crime is responsible therefor and liable to punishment under international law, independently of the attitude of domestic law, implies what is commonly called the "supremacy" of international law over domestic law. It is accordingly considered that international law can bind individuals even if domestic law does not direct them to observe the rules of international law. (It is in this sense that the term "supremacy" is used here). Characteristic of the above inference is the following passage of the Court's findings: "... The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."

Principle III

The fact that a person who committed an international crime acted as Head of State or public official does not free him from responsibility under international law or mitigate punishment.

The above text reproduces in a more precise form the principle laid down in Article 7 of the Charter. If, according to a general rule, a person acting as a State organ is considered as acting on behalf of the entity "State", and as such not responsible for his actions, in cases of acts constituting international crimes, according to the Charter and the judgment, the fact that an individual acted in an official capacity does not free him from responsibility under international law. "The principle of international law which, under certain circumstances, protects the representatives of a State", says the Court, "cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment . . ." The same idea is also expressed by the following passage of the findings: "He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law".

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not free him from responsibility under international law. It may, however, be considered in mitigation of punishment, if justice so requires.

This text in a somewhat different wording reproduces the principle contained in Article 8 of the Charter. The idea expressed by the above principle is that superior order is not a defence but that it might be considered in mitigation of punishment. In conformity with this conception, the Court rejected the argument of the defence claiming that there could not be any responsibility since most of the defendants acted under the orders of Hitler. The Court declared the provision of Article 8 to be "in conformity with the law of all nations". "That a soldier", the Court continued, "was ordered to kill or torture in violation of the international law of war has never been recognized as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment".

Finally, as regards the criterion for the determination of the degree of responsibility of a person acting pursuant to superior command, the Court said: "The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

1. The principle that the defendants charged with crimes under international law must have the right to a fair trial was unanimously recognized at the London Conference. All the drafts submitted to the Conference provided rules aiming at insuring such a right to the defendants.
2. The Charter contains a particular chapter entitled "Fair Trial for Defendants", which for the purpose of insuring a fair trial to the defendants directs the observance of the following procedure:
   a. The indictment shall include full particulars specifying in detail the charges against the defendants. A copy of the indictment and of all the documents lodged with the indictment, translated into a language which he understands, shall be furnished to the defendant at

a reasonable time before the trial.
b. During any preliminary examination or trial of a defendant he shall have the right to give any explanation relevant to the charges made against him.
c. A preliminary examination of a defendant and his trial shall be conducted in, or translated into, a language which the defendant understands.
d. A defendant shall have the right to conduct his own defence before the Tribunal or to have the assistance of counsel.
e. A defendant shall have the right through himself or through his counsel to present evidence at the trial in support of his defence, and to cross-examine any witness called by the prosecution.

3. Finally, it may be added that the right to a fair trial is also mentioned by the judgment itself. The Court, commenting on the lawfulness of the institution of the International Military Tribunal, said that "all that the defendants are entitled to ask is to receive a fair trial on the facts and law."

B. The Crimes

According to the Charter and the Judgment, the following acts constitute crimes under international law.

a. *Crimes against peace:* namely
   (i) *Planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances;*
   (ii) *Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under* (i).

Both categories of crimes are characterized by the fact that they are both connected with "war of aggression or war in violation of international treaties, agreements or assurances".

Though the Court had made a general statement to the effect that the Charter "is the expression of international law existing at the time of its creation", it also offered a certain number of arguments in order to refute the objection of the defence that aggressive war was not an international crime under international law. For this refutation the Court relied primarily on the Kellogg-Briand Pact, which in 1939 was in force between sixty-three nations. "The nations who signed the pact or adhered to it unconditionally", says the Court, "condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."

In support of its interpretation of the Kellogg-Briand Pact, the Court cited some other international documents condemning the war of aggression as an international crime. These documents were the draft of a Treaty of Mutual Assistance sponsored by the League of Nations in 1923 which in its Article 1 declared "that aggressive war is an international crime", and the Preamble to the League of Nations 1924 Protocol for the Pacific Settlement of International Disputes (Geneva Protocol) which, after "recognizing the solidarity of the members of the International Community", declared that "a war of aggression constitutes a violation of this solidarity, and is an international crime", and that the contracting parties were "desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for the pacific settlement of disputes between the States and of insuring the repression of international crimes". Furthermore, the Court cited the Declaration concerning wars of aggression adopted on 24 September 1927 by the Assembly of the League of Nations, the preamble of which declared a war of aggression "an international crime", and the unanimous resolution adopted on 18 February 1928 by twenty-one American Republics at the sixth (Havana) Pan-American Conference, declaring that "war of aggression constitutes an international crime against the human species".

The Charter does not contain any definition of the term "war of aggression", nor is there any such definition in the findings of the Court. It is by evaluation of the historical events before and during the war that the Court decided that certain of the defendants planned and waged aggressive wars against ten nations and were therefore guilty of this series of crimes. According to the Court, this made it even unnecessary to discuss the subject in further detail, or to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements or assurances".

The terms "planning and preparing" of a war of aggression are considered by the Court as comprising all the stages in the bringing about of a war of aggression from the planning to the actual initiation of the war. In view of that, the Court did not make visible distinctions between planning and preparation.

A legal notion of the Charter which was attacked by the defence is the one concerning "conspiracy" (last sentence of Article 6 (a) of the Charter). The Court, rejecting the objection of the defence against the adoption of this notion, applied it, though only in a restricted way. "In the opinion of the Tribunal", says the Court, "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the 25 points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

b. *War Crimes: namely violations of the laws or customs of war. Such violations shall include, but not be limited to murder, ill-treatment or deportation to*

slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

Here too the Court emphasized that the crimes defined by Article 6 (b) of the Charter were already recognized as war crimes under international law. "They were covered," says the Court, "by Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."

c. *Crimes against humanity: namely murder, extermination, enslavement, deportation and other inhuman acts done against a civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime .*

The above text distinguishes two categories of punishable acts: (a) murder, extermination, enslavement, deportation and other inhuman acts committed against a civilian population, before or during the war and (b) persecution on political, racial or religious grounds. Both these acts, according to the Charter, constitute international crimes only inasmuch as they have been committed "in execution of or in connexion with any crime within the jurisdiction of the Tribunal". Crimes falling within the jurisdiction of the Tribunal are (a) crimes against peace; (b) war crimes.

The Court applied Article 6 (c) in a very restrictive way. Though it admitted that "political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty", that "the policy of persecution, repression and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out," and that "the persecution of Jews during the same period is established beyond all doubt," the Court did not consider that the acts relied on before the outbreak of war had been committed "in execution of, or in connexion with, any crime within the jurisdiction of the Tribunal". For this reason the Tribunal declared itself unable to make a general declaration to the effect that acts before 1939 "were crimes against humanity within the meaning of the Charter". Article 6 (c) characterizes as crimes against humanity murder, extermination, enslavement, etc., committed against "any" civilian population. This means that the above acts are crimes against humanity even if they are committed by the aggressor against his own population.

Dollar Shortages and Communism

(Continued from page 454)

B. Is there sufficient concrete evidence of the currency stabilization, self-help and joint action so solemnly assured us when the Recovery Program was authorized?

C. Is it good sense to use our dollars to build up potentially competitive foreign industries beyond their prewar levels for the express purpose of earning added dollars in this country when there is bound to be sooner or later, increased tariff resistance to these imports or a plethora of business failures in America?

D. Should we not try to get away from so much outright giving of dollars and utilize increased private investments with appropriate encouraging government guaranties?

E. Should we not now insist that there be less so-called bipartisanship in fashioning these elements of our foreign policy if it means that we the people will be better informed of the pros and cons of proposed international ventures involving billions of our dollars?

F. Should we not insist that some of these dollars be directed toward retaining a working foothold in the Far East, e.g., Formosa, even if this involves the risk of use of military force?

G. Should we not recognize that our foreign fiscal commitments must be limited by our ability to pay, and demand certain specific standards of self-help before going on with more billions next year?

Much has been written suggesting the possibilities of noncompetitive imports for the United States. It is time that we should receive something more than vague promises that European productive capacities will be channeled into noncompetitive lines. Let's see a list of these co-called noncompetitive items. Otherwise we shall soon find ourselves in the somewhat ludicrous position of financing by gift dollars from tax resources, programs supposed to eliminate the need of further dollars, which can succeed of accomplishment only by taking these dollars away from American earners before they are taxed. While we all realize that we must buy as much more of European products as we reasonably can, there is no sense whatever in using tax dollars to create added competitive productive capacities in Western Europe. If we keep on doing this not only the administration itself but organized labor and the American public in general will be surprised and chagrined when the chickens come home to roost.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Protests Article on Insurance

■ This letter is written to protest the printing of an article on the value of a fire insurance policy by W. Jefferson Davis appearing in 36 A.B.A.J. 275. To anyone who is in a position to know the actual facts, the article is so obviously biased and based upon such a complete lack of knowledge, or at best a misunderstanding, of the operations of the fire insurance business that it must be challenged. While I am not in favor of any type of censorship, and I believe that nothing clears the air like a good argument, nevertheless I do not believe that it is in the best interests of the American Bar Association to print articles of this type vilifying a great American industry without at least a check on the facts.

For the record, I would like to submit the following in answer to the indictment made by Mr. Davis and to correct, if possible, the many false impressions which, undoubtedly, he has created.

In the first place, it is apparent that either Mr. Davis or a client had a fire loss and they were not satisfied with the adjustment. In view of the thousands of claim settlements made each year, each involving the determination of such an uncertain thing as the actual cash value of property at time of loss, it would indeed be strange if there were not an occasional dissatisfaction, but contrary to Mr. Davis, dissatisfaction is the rare exception rather than the rule. This will be borne out by the complaint department of any state insurance department and by the fact that in the past five years out of all fire insurance claim settlements, and the number is stupendous, less than one half of 1 per cent has become the subject of litigation.

The article is replete with broad, unsupported statements bordering upon viciousness and having no foundation either in law or in fact. Examples of these are "the shock that the average burned-out policyholder experiences", "the company offer, as is the custom, is negligible" and "customary latitude of 'over-insurance' " to mention but a few. In addition, he makes some wildly extravagant statements such as, that in event of total loss the usual practice is to offer 10 per cent. That is not usual practice and even in those cases where the company might refuse to pay the face amount of the policy because of a lower cash value at time of loss, it is reasonable to assume that the offer would be in the neighborhood of 80 per cent to 90 per cent unless the owner has deluded himself into believing that his $10,000 home is worth $20,000, or unless there are indications of fraud. These irresponsible generalities could be easily refuted if the time and space were available but in the interest of brevity I will confine my answer to the three principal allegations contained in the article.

1. *Problem of Actual Cash Value:* It apparently is Mr. Davis' contention that if a person carries $20,000 insurance on a building he should recover $20,000 in case of total loss, regardless of the actual value of the building at the time of loss. He quotes the section of the policy regarding "all loss or damage by fire" but neglects to continue on to the provision "to the extent of the actual cash value". It is a well-known fact among laymen, lawyers and insurance men that "actual cash value" does not mean the same as the original cost of the building or even its present replacement cost. It means the actual value at time of loss which generally is the replacement cost less depreciation. If a $20,000 building has depreciated $5,000 by the time of loss it would certainly be unconscionable to require payment of $20,000 as the owner would then stand to make a $5,000 profit.

Insurance is supposed to restore a person to the condition which he was in immediately prior to the loss but if he gets the value of a new building he would be in a better position. I don't believe that any policyholder could honestly expect to receive the price of a new house for an old one which burned. The amount stated in the policy is a maximum limit only and is not intended as an agreement that at any particular time the building is worth so much.

Mr. Davis deprecates the existence of the so-called moral hazard in insurance, probably through ignorance of what that term encompasses. Moral hazard does not merely include those cases where a person deliberately starts a fire but extends to the mental attitude of the insured who gets "forgetful" and doesn't keep the place as clean as he used to do or doesn't maintain it as well and all the other little things which can be of great help to start a fire, although not directly responsible for the fire.

That the condition is very real can be illustrated by the following. Let us assume we have a building worth

$20,000 in 1947 at the top of the real estate market. It is not unreasonable to assume that this same place in 1950 is worth only $15,000 in many areas. We must also consider at this point the fact that a great majority of fire policies are written for a term of three to five years. We then have the situation of a person paying out a mortgage on a piece of property which cost him $20,000 originally but which now is worth only $15,000. It must be admitted that under the circumstances if he can be sure that he will collect $20,000 he will tend to become a little careless. In other words, even though the property was worth $20,000 when the policy was written and is now worth only $15,000, it is Mr. Davis' contention that the insured should get the full $20,000. To state the proposition is to show its absurdity.

The only argument which he advances to support the proposition is that the insured has paid premiums on these values and should recover. This no more follows than would the argument that in case of a partial loss he should collect the face of the policy. He is purchasing indemnity and the face amount of the policy is merely the limit on the amount of the indemnity and not necessarily the amount which the company will pay. It agrees to pay for actual loss sustained and that is the basis of premium computation. In addition, when we consider that the premium probably runs from $2.50 to $5.00 per thousand per year, it would indeed be a foolish man who would not intentionally over-insure if he knows that he will collect the face of the policy under any conditions. It should be pointed out that if values drop the insured can always cancel off any amount he desires to bring the amount of insurance in line with the actual value and this is rightly his responsibility and not that of the insurance company.

2. *Valued Policy Laws:*

Part of Mr. Davis' difficulty with this whole matter is his lack of knowledge of insurance law and his unfortunate assumption that the laws of other states follow the laws of California whereas, in fact, California is unique in many respects from all other states in the country. Thus, he speaks about "valued policy" laws having in mind sections 2052 to 2054 of the California Code. This is not a "valued policy" law but at best might be termed an "agreed amount" law. I shall discuss this presently but first we must consider the actual "valued policy" laws.

The modern standard fire policy has always agreed to insure only to the extent of the actual cash value of the property. However, in some states back about 1890 it seems that a few policyholders, either through their own negligence or greed or through the negligence or greed of the company or agent, were over-insured and upon having a loss did not recover the face amount of the policy. These people promptly took their troubles to their legislatures as we are all too prone to do even today in the belief that "there ought to be a law". The so-called "valued policy" law started with the Wisconsin law of 1895 and in the next five to ten years other states passed such laws until at one time there were approximately twenty states with these laws. It is interesting to note that no new laws of this type have been passed in the past twenty to thirty years and of the three latest insurance codes in the country, each of which contained this provision originally, it was reënacted in only one.

These statutes, in effect, provide that in case of total loss the face amount of the policy is prima facie the amount due and payable under the policy. The statutes were designed to force the insurer to inspect and place a fair value on the property and charge premiums on that amount. Such statutes were poorly conceived and did not take into consideration the fluctuating value of real property as well as the increased cost to the insurance companies if appraisals were actually made. The net effect has been that the companies do not make appraisals of the usual dwellings because the total premiums only run $20.00 to $30.00 per year. As a result they rely upon the inherent honesty of most insureds to set a fair value. Because of the fact that probably about one fire in one hundred is a total loss the companies, rather than increase rates for all policyholders, take the "calculated risk" of not appraising dwellings in those states. It is reasonable to assume that such statutes have caused losses to increase to some extent and that in turn increases rates.

Mr. Davis appears to believe that companies voluntarily offer a choice of what might be termed "actual cash value" and "agreed amount or valued" policies. This false impression is created by the before-mentioned sections of the California Code which do contain provisions whereby the insured can get an appraisal (by paying for it himself) and then enter into what can be termed an "agreed amount" contract with the company. However, this peculiar California law bears no relation to the true "valued policy" law.

Contrary to his statement that "in many, if not all states, provision is made for issuance of the 'valued policy', comparatively few, if any, are written", the only state in which the kind of "valued policy" which he has in mind is available is California. In the eighteen states having the true "valued policy" law there is no choice on the part of either the insured or the insurer as to whether a valued policy will or will not be written. The law merely provides, in effect, that in the event of total loss the face amount of the policy will be paid. There is no question of "writing" one type or the other because the provision is contained in the statutes as a law governing adjustment of losses. It is not even incorporated into the policy as distinguished from the "agreed amount" provision of the California law.

The "new" legislation in California which Mr. Davis refers to as being watched with interest is really the true "valued policy" law which, as we have seen, is at least fifty-five years old and has been so soundly discredited that it has not been inserted in any code in recent years. The move in California to enact this

unfair legislation is not a typical move, contrary to his statement, but just another recurrence of an old problem.

3. *Unconditional and Sole Ownership:*

If Mr. Davis had taken the time to ascertain the facts he would have found out that the so-called "1943 New York Policy" is now used in the District of Columbia and all states, except California, Massachusetts, Minnesota and Texas. It is not used in these latter states because their legislatures have chosen to enact mandatory forms which, in many cases, are not as favorable as the 1943 policy. Contrary to his statements, in every case where the insurance business had the option it introduced the new form.

Further, if Mr. Davis had read the "1943 New York Policy" he would have found that the subject upon which he spent over a page, namely, "unconditional and sole" ownership is now moot. That provision is no longer contained in the "1943 New York" form which, as stated above, is in general use in 44 states and the District and has been since about 1945. As to what his own legislature may choose to do, that is their business, but certainly he should not place the blame on the insurance companies. In addition, it might be added that even when the provision was contained in the policy it was used only for protection of the company and the companies waived its application unless there was some indication of fraud.

For the record, I would also like to correct a few more of the many false impressions which he has created. He speaks of the "fabulously fattened coffers" of the insurance business, implying that the business had made an unconscionable profit over the past few years. I assume that he is referring specifically to the fire business. For the record, it should be set forth that for the twenty-five years ending 1947 the companies comprising the National Board of Fire Underwriters had an underwriting profit of 1.7 per cent. For a business that is continually exposed to conflagration and catastrophe hazards it is submitted that this is a very low profit margin.

He also refers to the thirty billions of dollars of assets of the insurance companies. He does not state the date of his figures but for the record, as of December 31, 1948, all fire insurance companies had aggregate assets of five billion and six hundred million, all casualty companies had aggregate assets of four billion and nine hundred and fifty million and all life companies about fifty-six billion, making a total of sixty-six billion and two hundred fifty million.

In conclusion, I would like to reiterate my opinion that an article of this type which is so plainly the product of a person whose feelings and pride have been hurt by what he believes to be an unfair loss adjustment should not have been printed in the JOURNAL, especially in view of the obvious misstatements which it contains. Certainly sufficient material of a constructive nature is available for publication without devoting space to articles of this type.

HARRY PERLET
United States Chamber of Commerce
Washington, D. C.

More About Fire Insurance

■ It has been our privilege to read an article in the April issue of your JOURNAL written by W. Jefferson Davis of the California Bar. From our experience of thirty-two years in the general insurance business we find Mr. Davis so far in error in the statements made in this article and in his omission of specific citations of bad practices that I feel you should, in justice to the general public, have this article answered by someone representing the fire insurance companies as well as the General Adjustment Bureau which adjusts fire insurance losses throughout most of the United States.

Mr. Davis is to be complimented on his dexterity in avoiding these specific citations of bad practices and sticking to generalities to imply these conditions he charges. As an attorney it would appear that he should know that the criticisms he makes of the old New York form have been remedied in the new form adopted in 1943 and sponsored by the insurance companies. He should also know that this new form has been urged upon all states for adoption. It is a fact that the companies have clarified and broadened all forms of insurance many times in the past several years. He speaks of the high percentage of insurance policies found to be void due to technicalities but he apparently does not take into consideration that there is a small percentage of homes which do not have mortgages. The great number coming under the supervision of the mortgage organizations over the country are very carefully scrutinized by the legal staffs of these companies and definitely are not void. He also knows, if he were inclined to admit, that the adjusters over the country have less than five per cent claimant dissatisfaction. His article would indicate that they do not have any who are pleased with the amount which they receive. The fact that he urges a valued policy is evidence to anyone who knows the experience of this form that he either has not learned, nor does he care to find out why, this form is not used. It has proved in the states where it has been tried to be a fine tool for the unscrupulous and dishonest claimant under a fire insurance policy.

As there are many who believe that insurance is the greatest stabilizing influence in the economy of every private or business enterprise, we urge that you publish an article that will give the true facts in connection with the settlement of fire insurance losses. Mr. Davis has certainly written a very misleading one. There are many fire insurance company executives thoroughly capable of demonstrating with facts and figures, which Mr. Davis elects to omit, that the insurance octopus does not indulge in universal racket methods.

CLAIBORNE W. DAVIS
Tulsa, Oklahoma

Is a Woman Lawyer an "Esquire"?

■ The JOURNAL for March, 1949, Volume 35, No. 3, Page 225, states:

> . . . The fellow has put a "Mr." before your name. Is he so ignorant as not to know that one of the few well-established usages of honorifics in this country is that every practicing lawyer rates an "Esquire"?

A point of information: What if the lawyer in question happens to be a lady?

WALTER KANE SCOTT
Seattle, Washington

The Supreme Court and Patent Law

■ With reference to my articles that you kindly printed in your issues of April, 1949 (at page 306), and August, 1949 (at page 696), I beg to submit the following, as bearing on the same subject.

I may say that the draft revision of the patent laws, prepared for the House Committee on the Judiciary endeavors by Section 23 to make a definition of patentable invention that will be quite ineffective since it will give the courts the same opportunity they now have to upset a patent on an improvement that is new and useful.

A case very recently decided in the Court of Appeals for the Second Circuit (*American Manufacturing Company* v. *Verplex Company*, March 27, 1950) speaks of "the increasing hostility to patents in recent years". Why should there be hostility to patents, upon which this country's enormous industrial progress has been based? It is, I believe, altogether due to the attitude of the Supreme Court, one of whose members in a comparatively recent decision said something to the effect that the only patent that is good is one on which his Court "has not been able to get its hands". Of course the lower courts have to be bound in their attitude toward patents by the decisions of the Supreme Court, and when they are adverse the lower courts are constrained to follow suit and destroy most of the patents that come before them.

The issues are so large and so important to the industry of the country that it is imperative to find what is the cause of the difficulty and, if possible, to find a remedy for it. It seems that the Supreme Court's attitude is based in large part upon ignorance of what a patent is in essence. A patent is not a monopoly, for a monopoly is concerned with that which should be open to the public to use; that is, with something the free use of which has been concentrated by illegal means in the hands of one or of a few. The patent, however, is concerned altogether with that which is new and useful—that which has been discovered by somebody and which thereby opens up a new manufacture. Under the Constitution and by statute, inventions,—or discoveries—of what is *new and useful* are awarded to the exclusive use of those who have found them out, for a limited period of seventeen years.

The net result of the constitutional policy has been to tend to promote the useful arts by holding out the reward of exclusive use as an encouragement to others to find out something new and so appropriate it for a limited time to himself and those claiming under him.

The unhappy situation that obtains at present in respect of patents is due to a misuse of the statute. The statute says that one who has found out that which is *new and useful* is entitled to the reward. The Supreme Court has insisted that the new and useful thing must be something beyond the comprehension of the ordinary artisan, and that something they dub "*patentable* invention". The entire controversy has ranged around "what is beyond the expected skill of the calling" and which, it is said, must amount to a "flash of genius". Since the Supreme Court looks at the subject involved with wisdom born after the event—"the cheapest of all wisdom"—it, being disposed adversely to patents, easily reaches the conclusion that what may have involved the utmost of study and research should have been achieved easily by anyone. It is like the old story of the jewel lost in the gutter. When one picks it up and claims ownership he should not be deprived of it by a bystander who says that he could have found it easily if he had looked for it; but the Court denies to the finder all claims upon his discovery.

The remedy is to deprive the courts of the right to speculate upon what was easily discovered or what was hard to attain. This can be done by a simple change in the law which will expressly deprive the courts of power to declare anything that is *new and useful* from being patentable on the ground that its finding out must involve some unexpected faculty of the mind.

DRURY W. COOPER
New York, New York

Praises *Journal's* Practical Value

■ The AMERICAN BAR ASSOCIATION JOURNAL performs and furnishes a valuable service and an important opportunity to small town and country lawyers as well as to those in the larger cities. And strangely enough, it is a service which either is not adequately appreciated or articulated by the practitioner who practices alone or in a small firm.

With the exception of the past two years, I have practiced since 1937 in Oxford and later in Jackson, Mississippi. Like most lawyers I did not have the time or a library adequate to sample and read in a large number of legal periodicals. If it were not for the AMERICAN BAR ASSOCIATION JOURNAL, I am afraid that my horizon in the legal and judicial world would become very much constricted to the particular cases and problems arising in my office. I have always liked the broad and public spirited variety and subject matter of your leading, feature articles. And I find now that this is true today also, even though I have available a large law library at the university.

Oftentimes an important and helpful law book is published which most law school reviews fail to cover, but my experience shows that it is us-

ually covered at some time in your "Books for Lawyers". The same goes for your sections on "Review of Recent Supreme Court Decisions", "Courts, Departments and Agencies," "Department of Legislation", "Tax Notes", and "Practicing Lawyer's Guide to the Current Law Magazines". The latter department particularly has given me a number of times a definite lead which dealt with a case I was in the process of briefing. And equally valuable is the fact that by reading the JOURNAL one can keep up with what his fellow lawyers are thinking and doing.

It is my firm belief that these excellent features of the JOURNAL pay off not only in information but also financially. It is a shame that we cannot double the number of regular "cover to cover" readers of the JOURNAL. At least those are the opinions of one long-time American Bar Association member and small town lawyer.

WILLIAM N. ETHRIDGE, JR.
University of Mississippi
University, Mississippi

School Trains Students for Trial Work

■ I have just read with keen interest the article in the January issue of the JOURNAL entitled "Performance Courses in the Study of Law: A Proposal for Reform of Legal Education" by Louis L. Roberts.

It is my belief that the members of the Association and the lawyers of this country should be deeply indebted to Mr. Roberts for his timely message on a subject which has been sadly neglected. It has always been a mystery to me why the great majority of law schools of our country continue year after year in the age-old method of cramming students full of theory while giving absolutely no consideration to the practical side of the practice. As Mr. Roberts so aptly points out, in no other profession is the training in the use of the tool of knowledge so neglected in our educational scheme. May I congratulate him on his very fine article and commend the reading thereof to every member of the Association.

However, I wish to enter my dissent to one statement made by Mr. Roberts. He states that although some of the law schools are talking about the reforms which he advocates and some are shyly experimenting, yet "none have boldly and courageously undertaken a solution." This statement is not exactly correct. For the past twenty-five years, the Law School of Baylor University at Waco, Texas, has been doing the very things which he says the law schools should do to produce lawyers who are not only well founded in theory but also have a practical and working knowledge of the practice when they emerge from the school.

Dr. Rufus C. Burleson, pioneer Texas educator, and one of the first Presidents of Baylor, mortgaged his farm in 1857 to found the first law school in Texas. Three prominent judges and practicing attorneys composed the faculty of that first law school. The War between the States caused the law school to be suspended until 1920. Shortly after it was reopened, its new Dean, Allen G. Flowers, brought to the faculty Judge James P. Alexander, a practicing attorney of the Waco, Texas, Bar, who had previously been a district judge. Judge Alexander brought to the Law School the panoramic acumen which combined his previous experience as teacher, lawyer and judge. He recognized that in the transition by which the professional schools supplanted the apprentice systems, doctrinaire instruction frequently subordinates practical craftsmanship to a catch-as-can basis. He, therefore, instituted at Baylor Law School what he called "Practice Court", which was more than a mere "moot" court as found in most law schools. Rather than a mere "moot" court, which was optional and which had not proved practical in other schools, the course that he organized was required of every senior student and continued over a period of nine months during the senior year.

To equip the student for the complexities of Texas trial work, the student was first given numerous questions accompanied by citations of authorities from which he dug the answers for the preparation of a note book. With the groundwork of procedural knowledge, the student began to draw together the threads of his substantive law study. Judge Alexander would give him a "live target" in the form of an authentic factual situation arising in his own broad legal experience and often facts from actual cases which he had had before him as a judge or in his private practice. Then the student was on his own with every possible artificial condition removed. He prepared his case, interviewed his witnesses, filed pleadings, took depositions, tried his case before fellow students acting as a court and jury while his adversary sat poised to swoop upon his inevitable blunders. Having helped the student struggle through the charge, verdict and judgment, Judge Alexander patiently pointed to pitfalls which were passed unnoticed, thereby saving the cause of many a real client thereafter.

During the entire nine months of the senior year, each student was required to go to town every afternoon during school days, go into a law office assigned for that purpose, and for several hours each day the student sat with a practicing lawyer, watched him deal and negotiate with his clients, watched the preparation and drafting of pleadings, wills and other instruments, and, when practical, he followed the lawyer to the courthouse where he observed actual trials in progress. Needless to say, the student became thoroughly familiar with the courthouse during the nine months he followed in the footsteps of a practicing attorney.

I feel sure that Mr. Roberts will be interested in knowing that there is at least one school doing just exactly what he advocates. There is a great and urgent need for the extension of this good work to other law schools. Frankly, I am at a loss to understand why other schools, even here in Texas, do not recognize the value of such a program as that which has been carried on so successfully at Baylor.

CLAUDE WILLIAMS
Dallas, Texas

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ In April, President Harold J. Gallagher addressed the Lawyers Club of Atlanta on the subject "Current Trends in American Government". The Lawyers Club publishes an interesting and lively bulletin called the "Monthly Report" which goes to all its members. In the March issue there was news of the work of the Club's Committee on Civic Affairs, which concerns itself with such matters as traffic safety and voting legislation; the Radio Committee, which has a weekly program, broadcast every Saturday evening over Station WGST; and an opinion of the Club's Committee on Professional Ethics.

As a supplement to the March number there is published a chart prepared to show the status of adoption in Georgia of the recommendations of the American Bar Association's Section of Judicial Administration. The chart, similar to one published in *The Record of The Association of the Bar of the City of New York,* is based on the facts reported in Chief Justice Vanderbilt's *Minimum Standards of Judicial Administration.* The New York chart and the Georgia chart are the first two of these charts which will be prepared for every state by the state committees of the Section of Judicial Administration.

■ New officers for the Federal Communications Bar Association are Neville Miller, President; William A. Porter, First Vice President; Arthur W. Scharfeld, Second Vice President, Thad H. Brown, Jr., Secretary and L. Reed Miller, Treasurer. The Association has announced that the subject for this year of its annual essay contest for students in accredited law schools is "Legal Limitations on Television Programming". A first prize of $200 and a second prize of $100 will be awarded for the best essays and they will be published in the Association's quarterly journal.

■ The Akron Bar Association, of which Howard C. Walker is President, has sponsored the organization of the "Akron Legal Secretaries' Association", which will be affiliated with the National Legal Secretaries' Association. Dinner meetings will be held monthly and the Association has adopted a code of ethics for its members.

The annual Law Institute of the Akron Bar Association is this year being organized on the basis of a contest, the purpose of which is to encourage submission of outlines on proposed lectures. Members may submit an outline on any legal topic. A jury of two lawyers and a judge, selected by the President of the Association, selects three of the outlines that they believe to be best from the standpoint of interest to the Bar and skill of arrangement. Each of the three successful contestants then prepares a lecture upon the topic submitted by him and at three meetings during 1950 the contestants preside and give their lectures and then lead a general discussion.

■ The Young Lawyers Section of the New York State Bar Association held its annual meeting in Albany in April. James J. Beha was elected Chairman, Herbert T. Slade was elected Vice Chairman, J. Vincent Smith, Secretary and Bernadine A. Luttinger, Assistant Secretary. The meeting was addressed by the President of the New York Bar Association, Otis T. Bradley, and by Chief Judge John T. Loughran of the Court of Appeals. The principal activity of the Section for the coming year will be a program of furnishing aid to the justices of the peace throughout the state.

■ The Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association, reports the following activities:

An Institute on Legal Problems of Small Businesses was given on March 25, 1950, in Washington, D. C., in collaboration with the Bar Association of the District of Columbia. The principal speakers were Chester Rohrlich of New York City, Arch M. Cantrall of Clarksburg, West Virginia, and Fred L. Rosenbloom of Philadelphia. A panel discussion was subsequently conducted under the leadership of John L. Laskey, Al Philip Kane, and Randolph Richardson, all of Washington. Approximately 140 lawyers were in attendance and James D. Mann, Executive Secretary of the Bar Association of the District of Columbia, reported that this was the most successful program of its kind ever held in the District. Plans are now being made for future Institutes on a permanent basis.

An Institute on Trial Practice was held in St. Louis, Missouri, on April 28 and 29 in collaboration with the St. Louis Bar Association. The subjects and speakers were as follows:

"How to Select a Jury"—Geoffrey B. Fleming

"Direct Examination"—Erwin R. Roemer

"Cross-Examination"—Floyd E. Thompson

"Arguments to the Jury"—Francis X. Busch

"Marshalling the Evidence"— Leslie H. Vogel

All the speakers are lawyers from Chicago.

In Erie, Pennsylvania, on March 31, 1950, under the sponsorship of the Erie County Bar Association an Institute on lifetime and testamentary estate planning was held. The text entitled *Lifetime and Testamentary Estate Planning* by Harrison Tweed and William Parsons of New York City, published by the Committee on Continuing Legal Education, was used as the basis. The speakers were William Wallace

Booth, Paul G. Rodewald and Henry Cooper, all of Pittsburgh. This is the first in the series of Institutes to be conducted by the Erie County Bar Association.

The third in the series of nine Institutes in Williamsport, Pennsylvania, under the sponsorship of the Lycoming County Bar Association, was held on April 5, 1950, on the subject of the recent Pennsylvania Wills, Estates, and Intestate Acts, in connection with the regional meeting of the Pennsylvania Bar Association. The principal speaker was H. Ober Hess of Philadelphia. An Institute on the drafting of partnership agreements was conducted in May.

OUR YOUNGER LAWYERS

Richard H. Keatinge, Secretary and Editor-in-Charge, Los Angeles, California

Powell's Studios

ROBERT H. HOSICK

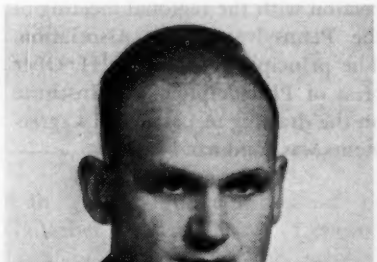
▪ Forty thousand, nine hundred twenty-six, or approximately 22.6 per cent of all lawyers in the continental United States were members of the American Bar Association at the close of our latest fiscal year, June 30, 1949. The Association's Chicago office has recently reported that the states rank as shown in the table on this page.

The American Bar Association's Standing Committee on Membership is composed of Walter M. Bastian of Washington, D. C., Chairman, Lyman M. Tondel, Jr., of New York City, and Robert H. Hosick of Kalamazoo, Michigan. In the opinion of this committee, the Association's membership is capable of being substantially increased so that the rolls may exceed 100,000 within the next few years.

Simultaneously with action by the older members to increase the rolls, the Junior Bar Conference Membership Committee is presently conducting a year-long program concentrating on nonmember lawyers under thirty-six years of age. Through a carefully organized direct mail campaign augmented by personal contact, invitations to make application for membership are being extended to lawyers who are sponsored by our younger members in the several states.

Rank	State	Per cent of American Bar Association Members to Total Number of Lawyers
1	Nevada	84.9
2	Delaware	65.7
3	New Hampshire	48.0
4	Arizona	47.1
5	New Mexico	45.3
6	District of Columbia	40.8
7	Vermont	39.1
8	Colorado	35.9
9	Louisiana	35.1
10	Washington	34.3
11	Florida	33.0
12	Wyoming	32.7
13	Utah	32.1
14	Connecticut	30.6
15	Montana	30.5
16	Mississippi	29.9
17	Rhode Island	29.1
18	Oregon	28.8
19	Tennessee	26.6
20	North Dakota	26.3
21	South Dakota	25.7
22	Nebraska	25.6
23	Idaho	25.3
24	Missouri	25.1
25	Kansas	24.9
26	Michigan	24.9
27	South Carolina	24.7
28	Illinois	24.3
29	Maine	24.3
30	Georgia	24.1
31	Indiana	24.1
32	Pennsylvania	23.7
33	West Virginia	23.5
34	Wisconsin	23.5
35	Minnesota	23.3
36	Virginia	23.3
37	Oklahoma	23.1
38	Maryland	23.0
39	North Carolina	22.8
40	California	22.4
41	Iowa	22.2
42	Alabama	22.0
43	Ohio	21.7
44	Texas	21.5
45	Arkansas	21.0
46	Kentucky	20.3
47	Massachusetts	18.7
48	New Jersey	17.2
49	New York	13.5

The Junior Bar Conference program is actively in progress in all states under the following personnel: Robert H. Hosick, National Membership Chairman, and the National Vice Chairmen: G. Gregg Everngam, Silver Spring, Maryland, John W. Mooty, Minneapolis, Minnesota, and Paul N. Olson Brattleboro, Vermont. Working with the Vice Chairmen are membership chairmen in each state. These men have been carefully selected because of their interest in Junior Bar Conference activities, and based on results to date high expectations are held for the success of their efforts in securing new members qualified for admittance by reason of integrity and ability as lawyers. The state membership chairmen are Alabama—John D. Petree, Jasper; Alaska—Burke Riley,



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JOHN W. MOOTY

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The biggest lawyers often live in the smallest towns.
—*Notes of a District Judge, Part II,*
by Claude McColloch, page 25.

Trading with Insurgents
(Continued from page 462)

this decree, the American vessel *Gaston* entered the port with the intention of loading a cargo of bananas. Before this could be done, a warship of the *de jure* government, the *Agua Prieta,* forced it to leave the port, and the bananas perished. The United States espoused the claim of the American owner. The Commission rejected the claim, the American Commissioner, Nielsen, dissenting. The majority opinion admitted that "the trading of the 'Gaston' to the port of Frontera was perfectly lawful" and that "the Federal Mexican authorities would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty on it". The Commission also admitted that no Mexican warship would have had the right to interfere with the *Gaston* on the high seas. They held, however, that by sending a warship into the port of Frontera, the *de jure* government obtained control of the port and that therefore it could not fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place. In the opinion of the majority of the Commission this port was in fact partly commanded by the *Agua Prieta.* In his dissenting opinion, Commissioner Nielsen stated: "I do not believe that a single, brief visit of a war vessel in the vicinity of a port occupied by insurgents is tantamount to control or command of the port".

The view of the majority of the Commission has been defended by Dickinson [34]. He thinks that the decision is a fair concession to the interests of the *de jure* government "distracted by an insurrection which, it may be assumed, it is rarely in the real interest of other States to encourage". This reasoning is contrary to the fundamental principle of international law according to which a state has no right to interfere in any way with an internal struggle for power going on within another state, but must remain strictly neutral.[35]

Woolsey[36] cites the Oriental Navigation case (*supra*) without approval or disapproval. The United States Naval War College[37] and Padelford[38] seem to accept the doctrine of the case. In view of the express or implied acceptance by these authorities of the doctrine propounded in the case, it seems appropriate to inquire whether such a rule is sound and whether it should become a generally accepted principle of international law.[39]

It is submitted that the decision in the Oriental Navigation case is based on an erroneous concept of sovereignty over territorial waters. These waters cannot by themselves be an object of sovereignty; sovereignty over them is but an incident to possession of the territory itself.

The sea has been free and not subject to any sovereignty since the most ancient times. The sovereignty of the states over territorial waters was instituted in relatively recent times on the basis of necessity, especially for purposes of defense. The Second Committee appointed by the Conference for the Codification of International Law[40] stated:

> International law attributes to each Coastal State sovereignty over a belt of sea round its coast. This must be regarded as essential for the protection of the legitimate interests of the State. The belt of territorial sea forms part of the territory of the State . . . this sovereignty is however limited by conditions established by international law. . . .

Therefore, the view that grants states sovereignty over their adjacent territorial waters would be deprived of its reason if the sovereignty over such waters were granted to anyone other than the sovereign of the territory adjoining these waters. Oppenheim-Lauterpacht[41] state:

> Territorial waters are inseparable appurtenances of the land.

Wiesse[42] concludes that if a neutral vessel is in a port controlled by a *de jure* government and wishes to go to a port occupied by insurgents and if the *de jure* government refuses to deliver the clearance papers necessary for such purpose, the vessel is entitled to leave the port without such papers, to go to the port occupied by the insurgents, and, upon returning to the port held by the *de jure* government, cannot be penalized for having left without clearing papers nor for any other reason.

The contrary view would lead to the result that the neutral trader who comes into a port occupied by insurgents would be obligated to observe two systems of law that may be in contradiction to each other; for there can be no doubt that he is obliged to observe the rules established by the insurgents. The sovereignty of insurgents has been likened to that of an occupying enemy army.[43] Such an army is the real sovereign of the country during its occupation.[44] For example, the custom laws of the insurgents and not those of the *de jure* government are to be observed.[45] This is also the view of the administrative branch of our Government, as evidenced by the telegram that Acting Secretary of State (Wilson) sent to the United States Consulate at Bluefields, Nicaragua, on May 31, 1910[46]. He said in that telegram:

> Bluefields . . . appeared to remain as theretofore under the de facto control of the Estrada faction. The Government of the United States therefore . . . admitted the right of the Estrada faction to collect customs for Bluefields and denied the right to the other faction.

34. "The Closure of Ports in Control of Insurgents", 24 *Am. Jour. Int. L.*, 69 ff. (1930).

35. Cf. the language in *Williams* v. *Bruffy*, 96 U. S. 716, 719 (1878). After quoting from Wheaton (*Int. L.* § 296), the Court says:

> The writer is here referring to the consideration with which foreign nations treat a civil war in another country. So far as they are concerned, the contending parties to such a war, once recognized as belligerents, are regarded as entitled to all the rights of war. As between the belligerent parties, foreign nations, from general usage, are expected to observe a strict neutrality.

See also the quotations from *The Santissima Trinidad* (7 Wheat. 283) and from Vatel (*Law of Nations*, page 425), found in the same decision.

36. "Closure of Ports by the Chinese Nationalist Government", 44 *Am. Jour. Int. L.* 350, 355 (1950).

37. *Loc. cit. supra* note 32.

38. *International Law and Diplomacy in the Spanish Civil Strife* (1939) 50.

39. For a critical view of the case, see Briggs, *The Law of Nations, Cases, Documents, and Notes* (1938) 745-749.

40. The Hague, 1930, as quoted in 1 *Hackworth Dig.* 624.

41. 1 *International Law* (7th edition 1948) 419.

42. *Le droit international appliqué aux guerres civiles* (1898).

43. *MacLeod* v. *United States*, 229 U. S. 416 (1913).

44. *30 Hogsheads of Sugar*, 9 Cr. 191 (1815); *United States* v. *Rice*, 4 Wheat. 246 (U. S. 1819).

45. *MacLeod* v. *United States*, *supra*, note 42.

The principle established here as to the right to levy taxes, and to enact and enforce customs regulations, applies of course to other matters of legislation and administration as it is based on the concept of sovereignty that remains the same.[47]

It is also the law of the insurgents that decides whether or not personal property situated in their territory has been validly transferred. As early as 1822, the United States Supreme Court stated:[48]

> Nor will the courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them . . . .

If the neutral trader has to observe the law of the insurgents and not that of the *de jure* government, he must be subject to the former in the territorial waters as much as anywhere else. To allow the *de jure* government to interfere with neutral trade in the territorial waters of the insurgents without establishing a blockade would mean to confer upon the *de jure* government belligerent rights in excess of those granted even to belligerents, for the latter would be required to establish and maintain a regular blockade. The evils of paper blockades having led to their prohibition under international law[49]; it does not seem appropriate to let them in again by the back door.

The fact that trading with insurgents is legal renders inapplicable the rules under which governments are, under certain circumstances, entitled to interfere with foreign ships even on the high seas. We refer especially to the right of hot pursuit[50] and to the theory recently applied in a decision of the Judicial Committee of the Privy Council of Great Britain,[51] according to which a state is entitled to seize a ship on the high seas whose master is about to commit a violation of the municipal law of the country seizing such ship. For in all these cases the interference with neutral commerce is justified by the fact that a violation of law was committed or was about to be committed, while the trading with insurgents, as we have seen, does not violate any law.

It is the *de jure* government that violates international law if it interferes with lawful neutral commerce. The neutral injured by such international wrong may apply to his government to protect him by armed force, diplomatic representations, arbitration, reprisals and all other remedies available in international law. He may also bring action in the municipal courts of the country that committed the wrong; but such action if permitted at all, will usually be futile, as the municipal courts will feel bound by the policy of their government. Unfortunately, there exists no international tribunal before which an aggrieved individual can bring his case if his government refuses or neglects to espouse it.

Even though they are not legally binding upon neutral traders, municipal decrees closing ports held by insurgents are often very effective. Thus the correspondent of the *New York Times* in Shanghai (Henry R. Liberman) reported on July 23, 1949:[52]

> Although the Nationalists are not able to maintain a continuous physical blockade and although the United States and Britain have pronounced the port-closure order illegal, spasmodic Nationalist bombings and occasional interceptions at sea have made shippers wary of sending vessels into Chinese ports.

On the other hand, states may advise their nationals to disregard invalid closures of ports held by insurgents. Thus, Secretary of State Hughes wrote to the Mexican *chargé d'affaires* on February 1, 1924[53]:

> . . . this Government, with the friendliest disposition toward the Mexican Government, feels obliged, following a long line of precedents, to respect what are believed to be the requirements of international law, to the effect that a port of a foreign country declared by the government thereof to be outside of its control, cannot be closed by such government save by an effective blockade maintained by it. Therefore, this Government takes the position that it cannot advise American citizens engaged in commerce with Mexico that they cannot have access to ports outside of the control of the Mexican Government and in fact controlled by insurgent forces. Moreover, this Government feels obliged to inform such American citizens that they may, in conformity with international law, deal with persons in authority in such ports with respect to all matters affecting commerce therewith.

46. 1 *Hackworth Dig.* 137-138. See also Acting Secretary of State (Wilson) to Consul Letcher, March 27, 1912, *For. Rel. 1912*, 907 ff.; Secretary of State (Stimson) to Ambassador in Mexico, March 29, 1929, 1 *Hackworth Dig.* 141; 2 Hyde, *op. cit. supra* note 5, 985.

47. For an application of the principle to currency exchange regulations, see: *Werfel v. Zivnostenska Banka*, 260 App. Div. 747, 23 N. Y. S. (2d) 1001 (1st Dept. 1940).

48. *The Santissima Trinidad*, 7 Wheat. 283, 336 (U. S. 1822).

49. Declaration of Paris (1856), Subd. 4, *Nouv. Rec. Gen.* XV, 792; 3 Hyde, *op. cit. supra* note 5 at 2188 f.

50. 2 *Hackworth Dig.* 700 ff.

51. *Molvan v. Attorney General for Palestine*, 81 LI.L.L.R. 277 (1948). See Ring, "Seizure of Foreign Vessels on the High Seas", 47 Mich. L. Rev. 555 (1949).

52. *New York Times*, July 24, 1949.

53. 7 *Hackworth Dig.* 167.

The Right To Strike

(Continued from page 442)

tion preventing a strike constituted involuntary servitude, or an injunction which ordered a strike to cease, involved involuntary servitude".[31]

The Court commented that the union's argument was "that the First and the Thirteenth Amendments were violated because, as a matter of fact, no strike was called, no strike existed. These men, it is contended, did, as individuals, what they had a right to do, work or not to work, and they decided not to work". To this attempt to evade responsibility, the Court responded that "the principle is this; that as long as a union is functioning as a union it must be held responsible for the mass action of its members. It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership".

In a still later case where an injunction was granted against the National

31. *U. S. v. International Union, U.M.W.*, 21 LRRM 2721 (1948).

Maritime Union forbidding it to strike to force employers to discriminate against nonunion employees, the Court said "We think that, under Supreme Court decisions, the 'involuntary servitude' provision of the Thirteenth Amendment is inapplicable here. For the Board's order does not expressly forbid employees to leave their jobs, individually or in concert. It is directed only against the Union and its agents".[32]

The decisions supporting a contrary view, which reject the legislative attempts to impose some restraint on strikes and a sense of responsibility upon the union in the exercise of this right, confuse the distinction between the right to quit one's job and take another and the right to cease work in order to participate in a strike. This misunderstanding arises partly from the use of the same words to describe the two different situations, and partly from lack of clarity of thought as to the elements of a strike. The Alabama Supreme Court in one of the leading cases upholding this position said that "we think . . . that workmen who are not bound by contract for a definite period . . . may, without liability, abandon their employment at any time, either singly or in a body, as a means of compelling or attempting to compel, their employers to accede to demands for better terms and conditions".[33] To "abandon their employment" as used by the court means merely quitting work and leaving the scene of work, as in a strike, or as a man quits work at night, but again the words very correctly might convey the idea of changing jobs. This is likewise true in the inexact use by the courts of the expressions "quit work" or "quit their jobs" to describe these two situations interchangeably. It is not surprising that the courts have become entangled in the web of their own careless language.

Continuing the court said "As we have previously noted, each individual employee has a right to strike for a legally justifiable purpose, and such a right, of course, rests upon a minority as well as upon a majority".

Thereupon the court ruled that the provision of the law requiring a majority to approve a strike before it was legal could not be sustained.

In support of its position, the court said further "Of course, as we have observed, the right to strike or refrain from work is a personal, individual right. Reduced to its last analysis, therefore, the question arises as to the reasonableness of a regulation making the right to strike dependent upon the will of others who may not in any manner be connected with, or interested in, the welfare of the minority group". Here again the court stumbles on the looseness of its thought. Unquestionably the individual has the right to quit his job and go to work elsewhere, as an individual. But can we say that the individual has the right as an individual to strike?

To Allow Minority To Strike at Will Destroys Right of Majority

The right of a majority of employees as a group to strike is a collective activity sanctioned by the law, but to protect the right of each individual or of each little minority to engage in a strike when it pleases is destructive of the rights of the majority of the workers. The majority to approve a strike, required in the law discussed in the preceding case, was that in the business, plant or unit, which does not indicate the lack of common interests condemned by the court.

Each employee must have his right to protest and to petition as to grievances, but collective activities, which are based on the assumption that they are in behalf of the majority, were given the specific protection of the law because of the inferior bargaining power of individuals.[34] For it to be otherwise would result in smaller groups attempting to bargain in competition with other groups in the unit or a minority trying to dominate the majority,[35]

32. *NLRB v. N.M.U.*, 24 LRRM 2268 (1949).
33. *Alabama State Federation of Labor v. McAdory*, 14 LRRM 710 (1944). Also, *Stapleton v. Mitchell*, 16 LRRM 560 (1945).
34. *NLRB v. Draper Corp.*, 145 F. (2d) 199 (1944).
35. *NLRB v. McGough Bakeries Corp.*, *supra* note 4.

and would culminate in the very weakness from which the law seeks to rescue them.

The courts have quoted the *Restatement of the Law of Torts* as authority for their position that "In the absence of applicable legislation to the contrary, the propriety of an object of concerted action by workers does not depend upon whether the object has the support of a majority of the workers affected. Concerted movements which ultimately gain the support of majorities are frequently begun by minorities".[36] This statement recognizes the lawfulness of certain joint activities and aims of such minorities, and the use of proper means to advance them. If it goes further, however, as some of the courts construe it, and approves the use of a strike by a minority to achieve their aims, then it is in error.[37]

In concluding, we wish to emphasize again the two aspects of the strike: the right to protest or publicize the dispute and the right to apply economic pressure or coercion against the employer. A distinction must be drawn between the two, for some of the courts identify all the implications of the strike with free speech. One court without qualification placed the right to strike and the right of free speech on the same level in rejecting a Kansas law that required a strike to have majority[38] approval. In another decision, the Alabama Supreme Court, after quoting from *Thornhill* v. *Alabama*,[39] the leading case on picketing, said that "The right of workers to enforce what they honestly conceive to be their just demands regarding wages, hours and conditions of work when a controversy arises with their employer by means of a strike is so enmeshed with the right of free speech as construed in recent federal decisions that the right to strike and to picket are but facets of the general principle first above outlined, and to abridge either when of lawful object and lawfully executed could not be sustained".[40]

The right of protest and of publicizing the labor dispute in a strike, either through the use of picketing in so far as it is peaceful or any other method may not be restrained if it does not contain any threats or intimation of physical violence or of punitive action for disregarding it or does not amount "in connection with other circumstances to coercion within the meaning of the act".[41] Such publication does not rest upon any requirements of reasonableness or truth. However, the right to apply economic pressure or coercion upon the employer, which is present in a strike and actually is the crux of the activity involving the leaving of work and the interference with the normal operation of the business, may be subject to reasonable regulation and conditioned in order to preserve it from abuse. Can we say that these employees are able to "enforce" their demands whatever they may be against the employer, even though they consider them to be "just"? The employer may in good faith believe that to yield would bankrupt the business, throwing these employees out of work, and the employer may be correct in his conclusions. In too many cases government boards have been willing to disregard the survival factor as it relates to the employer.[42] Admittedly, employees may leave their jobs, depriving the employer of their services, and, by publishing the facts, seek to create sentiment in their favor, but isn't that the limit of their legitimate activities?

Professor A. H. Frey of the University of Pennsylvania Law School in his excellent discussion[43] warns that the employee has no effective bargaining power "unless those who can perform the jobs in a given bargaining unit are able to act as one man, and unless that 'one man' is given the privilege which any individual has of refusing to work upon the terms or under the conditions proffered". In this Professor Frey is correct: that the majority should have the right to engage in a lawfully conducted strike. He goes on to say, however, "but legislation which curtails the right to strike, thus in effect eliminating collective bargaining, is not an expedient way to protect the public interest, for the consequences of the cure may too readily be worse than the disease". Here his language is inexact, as he does not tell us what he considers curtailing the right to strike to be. Is the requirement of the majority vote on a strike a curtailment in his thought? Do the limitation of the strike to genuine collective bargaining aims and the banning of strikes where another union has already been certified constitute a curtailment? It is a restriction in the view of labor leaders, although to this writer it is merely any assurance that it is a real collective action in furtherance of genuine collective bargaining.

The Board in the very recent decision[44] quoted above maintained the right of minority groups to strike. In its opinion the Board relied on *Kalamazoo Stationery Company* v. *NLRB*,[45] wherein the court sought, unsuccessfully in the writer's understanding, to distinguish the *Draper*[46] case and the *Brashear Freight Lines*[47] case in which such a minority strike was declared to be unprotected. In the *McGough Bakeries Corporation* case, the court labeled such minority action as "unlawful".[48] A reference to Section 9 (a) of the Labor Management Relations Act,[49] where it is provided that "Representatives . . . selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives . . . for the

36. *Restatement, Torts* 118, § 783.
37. See note 35 *supra*.
38. *Stapleton* v. *Mitchell*, *supra* note 34.
39. 310 U. S. 88 (1940).
40. *Hotel Employees Alliance* v. *Greenwood*, 20 LRRM 2123 (1947).
41. *NLRB* v. *Virginia Electric and Power Co.*, 314 U. S. 469 (1941); see also, Rose, "Labor Relations: Freedom of Speech for Employer and Employee", 35 *A.B.A.J.* 637, August, 1949.
42. *Crescent Brick Co.*, WLB 1943, 12 LRRM 1735.
43. Professor A. H. Frey of the University of Pennsylvania Law School, in a pamphlet entitled "Is Compulsory Arbitration of Wages Inevitable?".
44. See note 1 *supra*.
45. 160 F. (2d) 465 (1947).
46. See note 35 *supra*.
47. 119 F. (2d) 379 (1941).
48. See note 4 *supra*.
49. See note 3 *supra*.

purposes of collective bargaining", reveals that the law definitely excludes such minority groups from intruding in these activities to represent the unit or from taking such collective action as a strike. As has been remarked above, to permit such minority action derogates from the authority of the representative of the majority. Consequently, it is difficult to agree with Professor Frey that a law banning such group activities is destructive of collective bargaining. Obviously, the representative is not acting as "one man" when a minority engages in a strike. Consequently such activities should be prohibited.

Strikes May Injure General Community

We must remember that in the strike we are not merely weighing conflicting ideas or expressions of opposing rights, as in free speech, but are pressuring these opposing rights of one group against another, employing economic coercion, frequently bordering on violence, to secure their particular aims. In the strike we witness the staking of men's livelihood and means of support of their families on a refusal to work in order to attain certain desired but sometimes questionable ends that introduce an emotional tension into the controversy. Moreover, into this conflict come not merely the employees and the employer, but sometimes the whole community through the possible destruction of the business that is their principal source of income. Therefore we cannot lightly say that the employer has the right to continue operating his business "come hell or high water" or that the employees have the right to strangle the obdurate employer. Is the questionable privilege of slugging it out regardless of who gets hurt a democratic requirement?

In view of the antagonism frequently aroused, we must question whether the state should under any circumstances permit such coercive activity that so readily develops into violence and disorder. While our sympathies may lie with one or the other, depending upon the facts as we know them, in a democracy we must assume that the normal relations of men are peaceable. When we acquiesce in or condone violence, we are acknowledging a breakdown in normal procedures and are accepting the possibility of disorder and even insurrection. Society has in recent decades tolerated this extreme course of action because of its sympathy with many of the workers' complaints and apparently because it has not been able to determine upon a solution that will guard the rights of both sides and at the same time not require the interference of the state in matters that should be settled *vis-à-vis* by the employer and his employees. However, we must ever be alert to the danger we face in such toleration and to the imperative need for better adjustments.

If the parties cannot solve their conflicts on the basis of reasonableness, then the one with the greatest economic power will win. But we must caution that the excessive use of economic power is likewise undemocratic, and, if utilized unfairly to the disadvantage of the majority —and we do not mean only the union with its many members, but also the public which may be injured either by the union's demands or the employer's conduct—will lead to laws that belie its spirit while complying with the forms of democracy. In the strike, therefore, more than almost any other activity outside the strict political field both the employer and the employees are on trial to demonstrate and to confess the sincerity of their belief in the democratic processes.

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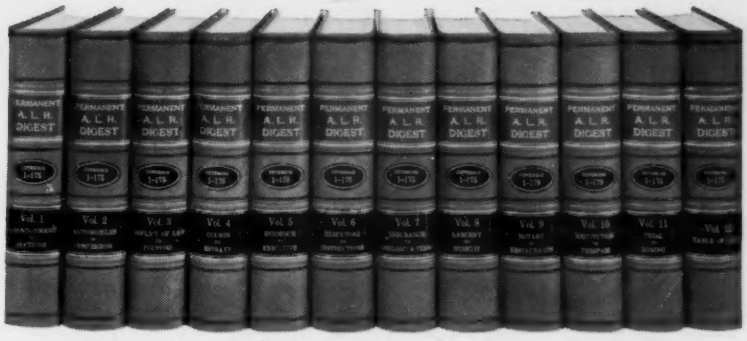

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